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In the Supreme Court of the United States

OCTOBER TERM, 1965

RECORD NOT PRINTED

No. 4901

SAMUEL H. SHEPPARD,
PETITIONER,

v.

E. L. MAXWELL, WARDEN,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Samuel H. Sheppard, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on May 5, 1965.

Citations to Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit is reported at 33 LW 2588, and is reproduced in the appendix to this petition at page Rs. 1. The opinion of the Court of Appeals for the Sixth Circuit denying rehearing

is unreported as yet, and is reproduced in the appendix at page Rs. 112. The opinion and order of the District Court is reported at 231 F. Supp. 37, and is reproduced in respondent's record-appendix[1] in the Court of Appeals at page Ra 393a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 5, 1965. Rs. 3. Rehearing was denied on July 12, 1965. Rs. 111. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Did the pre-trial publicity in petitioner's case so prejudice the community that no fair and impartial jury could have been impanelled?

2. Did the trial judge fail to adequately protect the petit-jury, once impanelled, from prejudicial extrinsic influence?

3. Did the trial judge fail to adequately interrogate the jurors when they had been exposed to prejudicial extrinsic matter through the news media during trial?

4. Did the trial judge fail to maintain constitutionally adequate decorum in the courtroom during trial?

5. Did the trial judge deny petitioner a public trial by assigning nearly all of the seats in the courtroom to newsmen?

6. Did the trial judge, in the special circumstances of this case, violate petitioner's constitutional right to a fair and impartial judge by failing to recuse himself despite

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[1] For convenience of reference, page numbers in the appendix to the petition will be preceded with "Rs"; page numbers in the respondent's record-appendix in the Court of Appeals will be preceded by "Ra"; and page numbers of the original transcript trial testimony will be preceded by "Tr".

his firm belief, undisclosed to petitioner, that petitioner was "guilty as hell" and that the case against him was "open and shut"?

7. Did the trial judge violate petitioner's federal constitutional right against self-incrimination by receiving evidence that petitioner had refused to take a lie detector test and truth serum?

8. Did the action of the bailiffs who permitted jurors to telephone outsiders during the course of deliberations in violation of Ohio law violate petitioner's federal constitutional right to a fair and impartial trial?

9. Did the court below deprive petitioner of proper review of other claimed federal constitutional violations?

10. Did the court below improperly foreclose without litigation the question of the sufficiency of the evidence?

11. Did the court below erroneously rule that no combination of individual errors, none of which rises to the stature of a federal constitutional violation, can in the aggregate show that the state court trial fell short of the requirements of due process of law?

Constitutional Provisions and Statutes Involved

Constitution of the United States

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Statutes

Section 2505.21, Ohio Revised Code. *Hearing on Appeal.*

"Appeals taken on questions of law shall be heard upon assignment of error filed in the cause or set out in the

briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded. * * * "

SECTION 2945.21, OHIO REVISED CODE. *Peremptory challenges in capital cases.*

"On the impaneling of a jury in a capital case, the state and the defendant, if there is only one defendant, may each peremptorily challenge six of the jurors, which challenges shall be exercised alternately. If there is more than one defendant, each defendant may peremptorily challenge six of the jurors, and the state may peremptorily challenge a number equal to the combined number allowed to all the defendants. Neither the state nor a defendant may be deprived of any of the challenges by reason of such order of exercising the same, or the time or manner of exercising the same."

SECTION 2945.29, OHIO REVISED CODE. *Jurors becoming unable to perform duties.*

"If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and

has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

SECTION 2945.32, OHIO REVISED CODE. *Oath to officers if jury sequestered.*

"When an order has been entered by the court of common pleas in any criminal cause, directing the jurors to be kept in charge of the officers of the court, the following oath shall be administered by the clerk of the court of common pleas to said officers: 'You do solemnly swear that you will, to the best of your ability, keep the persons sworn as jurors on this trial, from separating from each other; that you will not suffer any communications to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged, and that you will not, before they render their verdict communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God.' Any officer having taken such oath who willfully violates the same, or permits the same to be violated, is guilty of perjury and shall be imprisoned not less than one nor more than ten years."

SECTION 2945.33, OHIO REVISED CODE. *Keeping and conduct of jury after case submitted.*

"When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, nor

make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court. Such officer shall not communicate to any person, before the verdict is delivered, any matter in relation to their deliberation. Upon the trial of any prosecution for misdemeanor, the court may permit the jury to separate during their deliberation, or upon adjournment of the court overnight."

Statement of the Case

Your petitioner, Samuel H. Sheppard, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio on April 11, 1963. He alleged that he was being restrained of his liberty in violation of his federal constitutional rights by the respondent, E. L. Maxwell, who was and is the Warden of the Ohio State Penitentiary at Columbus. Such restraint was caused by a judgment of conviction for murder in the second degree in the Court of Common Pleas in Cuyahoga County, Ohio, on December 21, 1954; this judgment had been affirmed by the Court of Appeals of Cuyahoga County and the Supreme Court of Ohio, 165 O.S. 293. (The opinions of the Ohio Courts are reproduced in record-appendix Ra, pp. 49a and 109a). This Court denied a petition for a writ of certiorari to the Ohio Supreme Court, *Sheppard* v. *Ohio*, 352 U.S. 910.

The allegations of the petition were reduced to twenty-three stipulated issues. As to nine of these, stipulations of fact were submitted by counsel and accepted by the District Judge. Four of the remaining issues were consolidated with other issues, and upon these evidence was received. One issue, No. 19 (Ra 150a(2)), relating to the sufficiency of the evidence at trial, was not considered by the District Court.

Each side submitted various briefs dealing with all of

the issues except the sufficiency of the evidence, and on July 15, 1964, the District Judge entered an order voiding the state court conviction and admitting the petitioner to bail pending possible retrial. Respondent filed a notice of appeal and moved to stay the order allowing bail; on July 23, 1964, the Sixth Circuit Court of Appeals denied the motion.

On October 9, 1964, the appeal was argued before a three-judge panel of the Sixth Circuit Court of Appeals; on May 5, 1965, that Court entered an order reversing the judgment of the District Court and remanding petitioner to the custody of respondent, one Judge dissenting. On June 14, 1965, a petition for rehearing and rehearing en banc was filed; both were denied on July 12, 1965, the same Judge dissenting as to each. On July 26, 1965, petitioner's motion to stay the mandate pending application for certiorari was granted.

Statement of Facts

At some time during the early morning hours of July 4, 1954, petitioner's wife was beaten to death in her bed by some weapon which has never been ascertained or located.[2] She was last seen alive at about midnight by certain guests named Ahern who departed the Sheppard home on the shore of Lake Erie in Bay Village, Ohio, while the victim bade them goodnite at the door. Petitioner was at the time asleep on a couch in the living room. Petitioner was and is an osteopathic neurosurgeon, and on the evening in question was exhausted from emergency surgery.

Shortly before six o'clock in the morning, J. Spencer Houk, Mayor of Bay Village who lived two doors distant from petitioner, received a call on the telephone. He heard

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[2] The facts contained in this statement are taken from the stipulated history of the case. Ra 31a.

petitioner say weakly: "Spen! Come quick! I think they've killed Marilyn!"

Houk arose and dressed, as did his wife Esther. They got their automobile and drove the few yards to petitioner's home. Upon entering they found petitioner slumped in a chair in the den on the first floor. His trousers were wet and he seemed groggy and in pain. Marilyn Sheppard was found lying in her bed in a pool of blood. The entire room was spattered with blood. It was later opined by the coroner and others that she had been struck thirty-five times on the head with some blunt instrument. Her skull was fractured in many places but not crushed. Examination of the first floor of the house disclosed abundant evidence of ransacking.

Petitioner related to the Mayor his recollection as to what had happened. It is a narrative which has never varied to this day.

Dr. Sheppard stated that he had been awakened at some point during the night by the sound of his wife screaming. He rushed up the stairs from the couch where he had been sleeping, and as he entered the bedroom he saw a form standing next to the bed. He was unable to distinguish whether he was looking at a man or a woman, and did not know how many people were in the room. Suddenly he was struck from behind at the base of his skull and rendered unconscious. He came to at some undetermined later time, and heard noise on the first floor. He ran downstairs and chased what appeared to be a male person through the screen door at the back of the house and down to the shore of Lake Erie. There he grappled with his unknown assailant; he was caught in a strangle hold of some sort and was a second time rendered unconscious, again for an undetermined period. He awoke with the lower half of his body in the water, made his way back to the house, and called Houk.

In corroboration of his story, Dr. Sheppard exhibited severe facial injuries and a fractured cervical vertebra. There was sand in his pockets and cuffs. There was one diluted blood-spot on the knee of his trousers where he had knelt next to his wife to take her pulse after returning from the lake. And following the trial, when police returned custody of the house to the defense, a criminologist named Dr. Paul Leland Kirk found blood in the murder room which did not come from Dr. Sheppard or his wife.

On the morning of the murder, investigations were commenced by the Bay Village Police Department, the Cleveland Police Homicide Unit, the County Sheriff, the County Prosecutor and the County Coroner. No suspects of consequence were ever isolated. Dr. Sheppard was interrogated at the hospital to which he had been removed by numerous law enforcement officials. One of these accused him of the murder, which he flatly denied. He was asked to submit to a lie detector test, which he at first refused because of his physical condition and later on advice of counsel. He similarly refused police demands that he submit to truth serum.

The initial publicity concerning the crime was substantial. A concerned community pressed for solution of the crime. There was talk by the coroner of an inquest, but none was called. After a few days the attention given to the case by the news media began to taper off.

At this juncture the editor of the Cleveland Press, a leading newspaper in the Cleveland area, suspected that petitioner was being sheltered because of his affluence or social position.[3] To prevent this "shelter", and to fore-

[3] The role of this editor in guiding the Sheppard case toward what he thought to be a proper result need not be surmised or inferred, for he has set to print what he did and what his reasons were. *Seltzer*, "The Years Were Good", World Publishing Company, 1956. The chapter of this autobiography specifically relevant to the Sheppard case is reproduced in our appendix. Rs. 180.

stall any loss of public interest in the case, the Press instituted a series of banner-headed front-page editorials. These called for the "grilling" of petitioner by "third-degree" methods, castigated him for refusing the alleged exculpatory tests, and criticized law enforcement generally for failing to bear down on Dr. Sheppard.

The campaign was eminently successful. Public interest did not diminish or die, but was whetted to near-frenzied proportions. Although no additional significant evidence developed after the first day of investigation, editorial demands by the Press that (1) Bay Village authorities yield charge of the affair to the Cleveland Police, (2) the coroner call a public inquest, and (3) that Sam Sheppard be arrested were followed with swift compliance by elected officials. On July 30, 1954, twenty-six days after the murder, petitioner was arrested on a charge of murder in the first degree. He was thereafter indicted and on October 23, 1954, was put to trial before Judge Edward Blythin of the Common Pleas Criminal Court and a jury. The jury began its deliberations on December 17, 1954, and on December 21, after nearly five full days, found petitioner not guilty of murder in the first degree but guilty of murder in the second degree.[4] He was sentenced to life imprisonment.

During the trial the jurors were permitted to go to their homes each night. The news coverage of the affair was massive, and much alleged evidence was announced and summarized by the prosecution prior to its offer in court.

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[4] The verdict of second degree murder is significant, for as Judge Edwards has pointed out in his dissent, the only case presented to the jury involved premeditation; the only motive suggested to the jury was petitioner's affection for one Susan Hayes, with whom he had philandered some months earlier. The jury's rejection of this latter element presents a very large question as to just what facts they found to support unpremeditated murder.

A good deal of what was described as damning evidence was never produced.[5]

Judge Edward Blythin, who assigned the case to himself, remarked to a court clerk prior to petitioner's indictment that petitioner was as guilty as he (Judge Blythin) was innocent of the murder of Marilyn Sheppard. While the jury was being impanelled, Judge Blythin visited in his lobby with Dorothy Kilgallen Kelmar, a nationally syndicated columnist. He remarked to her that petitioner was "guilty as hell" and that the case was "open and shut". He did not disclose these views to defense counsel, or recuse himself because of them.[6]

Prior to trial Judge Blythin caused to be erected inside the bar special benches. These, together with all save one of the regular benches, he assigned by name to various newsmen. Every major news service was represented at the trial. One bench was reserved for the families of the defendant and the victim. Others could gain admission to the courtroom only by exhibiting a special pass signed by Judge Blythin.

The newsmen constantly disrupted the proceedings, moving in and out of the courtroom at frequent intervals to shift off with teammates and making noise generally. Photographs and television pictures were taken constantly at each minute that the trial was not in actual progress. Petitioner was repeatedly photographed in the courtroom without his consent, and was depicted daily in the news. Frequent requests by counsel and occasional admonitions by the court did not maintain a peaceful and serene decorum.

Two policemen testified that petitioner had refused on several occasions to submit to a lie-detector test. When re-

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[5] See for instance the outrageous story in the Cleveland Press announcing expected testimony that petitioner was in fact a "Jekyll-Hyde". Rs. 109.

[6] These facts were found by the District Judge. Ra 458a.

quested to instruct the jury that such fact was of no consequence, the trial judge stated that no person had a legal obligation to submit to the test; he did not state that a refusal was of no probative weight.

Throughout the trial the news was peppered with anecdotes extraneous to the record. Robert Considine stated over WHK radio that petitioner's denial of guilt reminded him of the denials of Alger Hiss when Hiss was convicted of perjury. The trial judge refused to ask the jurors if they had heard this remark. Walter Winchell announced that a girl in New York then under arrest for armed robbery revealed that petitioner was the father of her illegitimate child. The trial judge asked the jurors in a body if they had heard the story, and two said that they had but would not be influenced by it. The Cleveland Press bannerheaded the fact that a "bombshell" witness would soon testify that Marilyn Sheppard had once privately described petitioner as a "Jekyll-Hyde". No witness so testified, and the jury was not interrogated as to this disclosure.

The trial judge, over objection, permitted Mrs. Dorothy Ahern to testify that she had been told by Marilyn that Marilyn had been told by a Dr. Chapman that Dr. Chapman had been told by petitioner that petitioner was considering divorce.[7]

Motions for continuance and change of venue were presented before and repeatedly during the trial, and all were denied.

The judgment of conviction has been under litigation constantly during the past eleven years.

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[7] Cf. dissenting opinion of Ohio Supreme Court judges Taft and Hart. Ra 121a.

Reasons for Granting the Writ

Petitioner respectfully suggests that there are several different reasons for granting a writ of certiorari to the Court of Appeals. First and foremost is the fact that this trial was, as the District Judge remarked, a "mockery of justice", and ought not to be allowed to permanently stain the record of American jurisprudence. Second, there are numerous individual violations of the federal constitution which cannot now be vindicated without action by this Court. Third, the reviewing process in the Court of Appeals fell far short of that required by current habeas corpus decisions of this Court; and finally, the conduct of prosecuting officials and newsmen which the Court of Appeals now condones was so flagrant and abusive that the stamp of approval they now enjoy should be eradicated.

We will deal first with those questions confronted by the District Court and the Court of Appeals; second with those alleged constitutional violations noted but not considered by the District Judge and summarily rejected by the Court of Appeals; and third with the failure of review described above.

I. The Publicity and Control of the Courtroom and Jury

Among the exhibits certified to this Court by the Court of Appeals are five bound scrapbooks, green in color. The parties stipulated in the District Court that these scrapbooks contain all of the newsclippings in the Cleveland area from the day of the murder until the rendition of the judgment of conviction.[8] Several of the most objectionable headlines and editorials have been reproduced as foldouts in the appendix to this petition. Also in the appendix is trial counsel's affidavit describing the circumstances in the court-

[8] See Ra 297a.

room during the trial. All of the opinions of the Ohio Courts, and the opinion of the District Judge who freed petitioner, are contained in respondent-appellee's record-appendix in the Court of Appeals. Nine copies of this three-volume record-appendix have been transmitted to this Court for examination in connection with this petition. The record-appendix further contains a history of the case, stipulated facts bearing on some issues, extracts from the trial transcript relating to other issues, and statements of the witness who had conversation with Judge Blythin.

A. *The Pretrial Publicity:*

Judge Weinman, in his opinion, has set forth in some detail the text of certain of the "news" stories which appeared in Cleveland between the date of the murder and the commencement of the trial. It was these stories which led him to apply the principle of *Rideau* v. *Louisiana*, 373 U.S. 723, to the present case and rule that no fair and impartial jury could have been impanelled in Cuyahoga County in October, 1954. These excerpts, however, are but a very small part of what was written about Sam Sheppard during the months in question. The sheer volume of material which was heaped upon the citizenry can only be ascertained from the aforementioned scrapbooks.

While it is certainly true that the law cannot promise or indeed furnish jurors who have read and heard nothing about the case to be tried, this Court has in several instances been confronted with situations where it was necessary to conclude that the jury had been tainted by exposure to news releases. *Irvin* v. *Dowd*, 366 U.S. 717; *Rideau* v. *Louisiana*, 373 U.S. 723; *Janko* v. *United States*, 366 U.S. 716, *Marshall* v. *United States*, 360 U.S. 310. Petitioner contends that circumstances here warrant the same result.

Collisions between the right of a free press and the right

to a fair trial do present, as the District Judge has noted, problems most difficult of resolution. To preserve prospective jurors in a wholesome and impartial condition while allowing full run to the public's "right to know" doubtless requires some treading upon a legal tightrope. But there is in this case one element which the decisions above-cited lack; publicity which did not flow from the natural stream of news activity, but which was deliberately and maliciously contrived and disseminated in a manner *calculated* to prejudge a criminal case. It is this aspect of the Sheppard case which the Court of Appeals refused to confront despite the fact that the opinion of the District Court found it to be of prime significance.

Because of its constitutionally-guaranteed freedom, a newspaper wields great power. Aspiring politicians as well as those holding office can be destroyed by an irate press. It is therefore of considerable importance to note that all of the persons whose official action is claimed by petitioner to have wrongly produced his conviction were elective, and that some—including the prosecutor and the judge—were facing an imminent election as the trial began.[9]

Mr. Seltzer, the editor who decided to "move" the Sheppard case, has made no bones about his intentions, his methods, or the results he produced. His agent, a reporter named Forrest Allen, correctly stated over WHK radio in Cleveland on the day the trial began, "I think the Press handling of the Sheppard story produced the trial that we have got going on over there today because I don't think the officials were going to do anything about it." Of significance is the fact that the Press continued to use its might to produce a conviction— a conviction which by that time it badly needed to stave off subsequent libel suits—by reporting un-

[9] Prosecutor Mahon was successful in winning election to the Common Pleas bench. Judge Blythin won re-election by a landslide. Dissenting opinion of Judge Edwards, appendix B, Rs 101.

true, inadmissible and prejudicial information throughout the trial.

We think it highly doubtful that any citizen can enjoy a fair trial in a community permeated by a large newspaper which has as its purpose prosecution and conviction. Judge Weinman noted that:

> "If ever there was a trial by newspaper this was a perfect example. And the most insidious violator was the Cleveland Press. For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame and prejudice the public." Ra 453a

Sam Sheppard was not arrested because officials had or came upon some piece of evidence tending to show that he had killed his wife. He was arrested because editor Seltzer wrote an editorial of the front page of his newspaper which was bannered "WHY ISN'T SAM SHEPPARD IN JAIL" and thereafter changed the banner to "QUIT STALLING — BRING HIM IN". The fact that arrest followed hard on the heels of this editorial rather than upon the discovery of some new facts is ample proof that the processes of the law had crumpled before the power of a man who cared little for the rights of an American citizen. It is this shocking conduct which the majority in the court below have chosen to enshrine with the condonation of the law—a condonation which ought to be sharply stricken down.

Beyond the vicious attacks of the Cleveland Press and the shabby but less virulent me-tooism of the other Cleveland newspapers, there was one significant event which

further aggravated the hostile undercurrent against which petitioner vainly tried to swim. County Coroner Samuel Gerber, immediately upon the demand of the Press (see appendix Rs 117, 118 (called an inquest. Although such proceedings were customarily held in the county morgue, Coroner Gerber staged the Sheppard inquest in the gymnasium of the Normandy School in Bay Village. He explained at trial that he took this unusual step because he wanted to have an audience (Tr. 3453) and desired to "satisfy" the people (Tr. 3452).

We submit a description of these proceedings as we believe them to be relevant to the issue of pre-trial prejudice in the community. A pre-trial proceeding may well cause disruption which affects the constitutionality of the trial itself. *Estes* v. *Texas*, U.S. , 85 S. Ct. 1628.

The inquest was attended by the county prosecutor, who acted as advisor to the coroner, and two detectives, who acted as bailiffs. The petitioner was subpoenaed, as were members of his family. The gymnasium where the inquest was held seated several hundred people, and was crowded to capacity. Across the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment was set up in the room. Two live microphones were placed, one in front of Coroner Gerber and one in front of the witness stand, so that all which was said by the coroner or the witness was broadcast. A squadron of newsmen was present, and photographs were constantly being taken.

When petitioner and his brother, Dr. Stephen Sheppard, entered the room they were searched in full view of the audience.

Petitioner's counsel were present at the outset but were ordered not to in any way participate by the Coroner. When counsel objected to some part of the proceedings he

was forcibly ejected from the room. Delighted ladies ran up to Coroner Gerber and hugged and kissed him for this splendid move.[10] The inquest commenced on July 22 and ran for three full days. At its conclusion Gerber announced for the news media, "I could order Dr. Samuel H. Sheppard held for action by the grand jury." Why he did not take such a step was unexplained; but having in mind that Dr. Gerber was and is a member of the bar, perhaps he was troubled by a lack of probable cause.

The District Court has adequately set forth enough of the publicity before trial to warrant a conclusion that the Cleveland community was in no condition to furnish a jury sufficiently impartial to reach minimium standards of due process. Additional material contained in the green scrapbooks reinforces this position very soundly. We submit that the Court of Appeals was in error in rejecting as clearly erroneous the District Judge's finding of fact, and that examination of the matter by this Court warrants granting the writ.

B. *Publicity During Trial:*

Defense counsel sought vehemently to postpone the trial until what it felt was public prejudice could subside, and to change the venue to some other county not saturated with the invidious art of the Cleveland Press. The trial judge denied these motions. Although the fact is relevant to a subsequent issue, we are constrained to point out that the trial judge was a candidate for re-election to this post in November, 1954. He was the subject of laudatory articles by the Cleveland Press, which on October 9, 1954, published the following:

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[10] See the opinion of the District Court, Ra 443a.

"JUDGE BLYTHIN AT 70 HAS INSPIRING CAREER"

"Judge Edward Blythin will be 70 tomorrow. The Press wants to be the first to congratulate him and does so now, even if it means jumping the gun.

The milestone is important. It calls for hearty wellwishes. The career can't be emphasized too often either. It is the answer to those who try to make you believe the doors of opportunity are now closed.

The Blythin rise to high office is a heartening story of a young Welch bookkeeper who came to America to visit a brother, who decided to stay and who in time became the Mayor of the big city of his adoption. It is a story of ambition, of struggle, of determination, of triumphs.

Judge Blythin is a forthright man, a plain man and a hardworking man. One almost hesitates to say he has a sense of humor. So many men credited with that happy faculty really lack it. Judge Blythin has the rare quality. It has sustained him in many difficult situations.

One can go on in length about the man and his career. The birthday, though, is the affair now at hand, or nearly so.

Happy Birthday, Judge Blythin. And may you enjoy many more happy, fruitful years."[11]

The reason that the Press "jumped the gun" in issuing these warm felicitations is made clear by another matter which it printed the same day. The Press had learned that defense counsel, in order to prove that a change of venue was necessary, had begun a move in the nature of a Gallup poll to demonstrate the widespread public belief that petitioner was guilty.

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[11] This editorial and the one set forth below are contained in the newsclips in the scrapbooks.

"NON-LEGAL NONSENSE"

"Whatever the motive of the mass-survey of opinion on the guilt or innocence of Dr. Sam Sheppard, the technique is wrong, and dangerous.

The surveyors are asking for an off-the-cuff verdict from people who have not heard the evidence.

The 'findings' of this survey will be based solely upon hearsay, upon personal and uninformed opinions.

And yet the result will, unquestionably, be introduced into the trial, presumably in an effort to move the trial to some other city.

The whole scheme is non-judicial, non-legal nonsense.

It smacks of mass jury-tampering.

Defense Attorney William Corrigan should know that, and call the whole thing off immediately.

And the Bar Associations, which are always so sensitive to any outside effort to interefere with the Courts, should come forward to resist this effort, too."

Thus in none too subtle fashion, the Press informed Judge Blythin that it was opposed to any changes of venue. Since the judge never articulated his reasons for denying such relief, we think it impossible to say that he was not influenced by the conduct of this newspaper.

If there had to be a trial in Cleveland, the judge had a duty *sua sponte* to sequester the jurors once they were picked. He well knew that the trial was going to become a newsman's holocaust, for he had spent some time making the unusual arrangements to accommodate reporters and exclude the public.[12] The Court of Appeals was of the

[12] Judge Blythin also knew that the jurors were reading the newspapers. Juror Barrish explained on voir dire that he had been reading

view that this duty did not exist unless some motion for sequestration had been made by the defense. Rs 9. We think this a most unfair position to take. Defense counsel had sought the proper remedy, and it had been denied them. They were not bound to seek alternative remedies which might later be held to have watered down such appellate rights as had accrued through denial of a change of venue. If Judge Blythin sincerely felt that twelve people could be found who would be impartial at the outset, he should have used his full powers to preserve what impartiality there was.

As Judge Edwards has pointed out in his dissent, failing to lock up the jury was only one of the ways in which the trial judge fell short in his obligation to preserve its freedom from taint. He did not *order* the jurors to refrain from exposing themselves to news accounts of the trial or the case in general; he did not interrogate the jurors when it was brought to his attention that outrageous false stories and opinions were being broadcast by nationally prominent newsmen. And he did not declare a mistrial when it became apparent that the news media were conducting their own trial of petitioner quite apart from any court control. When approached by counsel about these extrinsic influences, he repeatedly threw up his hands and disclaimed any power to remedy the situation.

For his failure to take these steps in at least an attempt to secure to petitioner an impartial jury, it must be said that Judge Blythin's handling of the trial did not comport with what our constitution means by "fair trial". This proceeding was more in the nature of a sham and a circus,

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all about the Sheppard case every day since his name had been published in all three Cleveland papers as a prospective juror, and that he had been "following it up because if I was chosen I'd know something about the case". Tr. 62.

used to transmute into a legal judgment the dictates of a greedy and glutted press.

Also pertinent to a determination as to whether this trial is constitutionally defective is the courtroom atmosphere which prevailed. This is especially true in view of the recently announced principles of *Estes* v. *Texas*, U.S. , 85 S. Ct. 1628. For although various Justices of the Court have differed in approach, we read the *Estes* case as establishing beyond question that substantial disruption and distraction in a courtroom is constitutionally impermissible. And while the Sheppard trial did not have live television in open court, the record discloses distractive influences beside which the *Estes* trial was the picture of serenity.

The District Court in voiding petitioner's conviction noted and disapproved of the unusual arrangements made by the trial judge to accommodate the news media:

> "It is one thing to accommodate the news media; it is quite different when a major portion of the courtroom is reserved for it. Here a comparatively small courtroom was reserved primarily for the news media and the trial was its showpiece. The Supreme Court of Ohio characterized the atmosphere surrounding the trial as "a Roman holiday for the news media". Under such circumstances, the requisite atmosphere for a fair trial could not, and in fact did not, exist." Ra 451a.

Judge Edwards, dissenting in the Court of Appeals, noted in some detail the objectionable courtroom setting. Rs 59. And ample description thereof is furnished by trial counsel's affidavit in support of his motion for new trial. Rs 158.

In addition to the confusion and distraction which must

result whenever a trial is given over entirely to newsmen, we think as fatal error there can be no worse constitutional violation than the continual spotlighting of the jury—in this case with the approval and cooperation of the trial court.

> "And special note must be given the attempt of the newspapers to influence the jury. It was startling to find photographs of the entire jury and of individual jurors (at times giving their home addresses) in no less than 40 issues of the Cleveland newspapers. The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting." Ra 452a.

This observation by Judge Weinman is especially pertinent to what Mr. Justice CLARK has said in *Estes* v. *Texas,* U.S. , 85 S. Ct. 1628, 1634; speaking about jury exposure to the community through the medium of television, which is different in *kind* from the instant case but certainly not in degree:

> "The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that their friends and neighbors have their eyes upon them. If the community be

hostile to an accused, a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused***'."

In comparing the Estes circumstances with the case at bar, we feel that the following points are germane:

(1) The Estes jury was sequestered. Thus they did not see the publicity during trial, were unaware as to what public and press sentiment was, and were not exposed to sidewalk opinions which might have led them to understand that an acquittal would have been most unpopular. The Sheppard jury did not have this protection.

(2) If the Estes jury feared that its result would be second guessed by a public which had observed the evidence firsthand, at least that jury enjoyed the comfort of knowing that what the public viewed was actual evidence. But the Sheppard jury knew that the public was largely unaware of all of the *evidence*, since it learned only those sensational portions which newsmen saw fit to excise from the proceedings. The Sheppard jury must have been aware that the case against petitioner as reported by the press was far more grave than the case disclosed by the actual evidence, and thus must have felt pressure to make its verdict conform to that which the public would have been seduced to expect.

(3) Even though the Sheppard jury was not subjected to live television in the courtroom, the publicity which each juror was afforded was sufficient to produce exactly the situation which live television would have produced. Because of constant photographing and listing of names and addresses of individual jurors,

each juror must have felt that he or she was going to be held publicly accountable for his or her vote by stranger and acquaintance alike.

Both the District Judge and the dissenting judge in the Court of Appeals have pointed up numerous specific violations of petitioner's right to have his jury insulated from extrinsic influence, and to have the effect of such influence carefully investigated once exposure to prejudicial material has been shown. We do not repeat those instances here, but we respectfully suggest that they show beyond question that the trial court's handling of the entire matter was woefully inadequate, and operated to deprive petitioner of a fair trial.

II. The Impartiality of the Trial Judge

The District Judge found as a fact that the state judge who presided over petitioner's trial had said in July, 1954 (before there was an indictment), "Sam Sheppard is as guilty as I am innocent"; and that he said in October, 1954, "This is an open and shut case—he is as guilty as hell!" The District Judge ruled that such expressions of prejudgement by one entrusted with the supervision of a capital case removed the presumption of impartiality to which all judges are entitled, and that the failure of Judge Blythin to recuse himself under the circumstances violated Dr. Sheppard's federal constitutional right to a fair and impartial trial.

To this view the majority of the Court of Appeals took exception. After reviewing numerous authorities wherein it is declared as a matter of black-letter law that statements adverse to deceased persons are to be regarded with suspicion, and then accepting as fact the findings of the District Judge, the Court of Appeals held that such decla-

rations raised no presumptions as to impartiality and destroyed none. After reciting several of the trial judge's self-serving declarations which proclaimed his absolute impartiality in the case, the Court of Appeals concluded that whatever he may have said prior to trial was insufficient to justify a presumption that the presumption of impartiality was removed. This ruling was, we contend, erroneous.

For his defense of Judge Blythin and the judiciary generally the author of the majority opinion in the Court of Appeals is to be commended. Indeed, what he has said is correct in principle, we hasten to agree. If those whose lot requires that they bestride the bench in cases of white-hot controversy were not protected from frivolous attack and careless slander, it is doubtful that the judiciary of this nation would command the Bar's top echelon if every judge whose lot it was to make close judgment were immediately opened up to impeachment because one party or the other was discontent with the result. And no matter how great the reluctance to venture an attack upon one whose burden it is to preside at the trial of a difficult lawsuit, certainly that displeasure increases tenfold when such a move must be made posthumously.

There is, nonetheless, the need to face the fact that petitioner was tried in a volatile atmosphere under conditions where every fiber of a strong and courageous presiding judge was essential to any hope of a trial that the framers of our constitution would have thought to be "fair". The obstacles facing Judge Blythin were considerable. The popularity of the state's cause had been articulated repeatedly in the news media. Judge Blythin was a candidate for re-election by popular vote *during the course of the trial.* He had been publicly praised by the newspaper which most needed a conviction, for reasons of prestige and financial security. The trial counsel for the state was a

brother (but not a competing) candidate. Judge Blythin thought petitioner to be guilty, as the District Judge has found. This was, we think, under the circumstances of this particular case, sufficient reason for the judge to recuse himself, *sua sponte*.

But the greatest evil in this situation was the expressed notion by Judge Blythin that the case was "open and shut". Just what he meant by this phrase can never be exactly known. But the plain import of such words is that the trial was a mere formality to legally endorse a prejudged result. We submit that any judge who prior to trial in a case of this sort felt that the cause he was about to hear was of an "open and shut" nature should have recognized his preconception of the matter and withdrawn from the case. Especially significant, in view of the elaborate voir dire of the jurors, is this evidence that Judge Blythin himself had been so convinced of petitioner's guilt that he could not withhold his opinion from an eminent newslady (who was at most a perfect stranger) whom the judge wished to be advised as to the "inside" scoop. Since the judge had obviously been no part of the investigation of the case, one must conclude that he persuaded himself of Dr. Sheppard's complicity either through the conduct of the news media, or through some private communication with his son who was a member of the Cleveland homicide bureau.

In either case, we submit that this judge was not in a position to render those delicate decisions which a case of these proportions necessarily involves. There can be no doubt that a continuance or change of venue would have incurred the probable wrath of the public, and the certain wrath of the Cleveland Press. As against either kind of disfavor, Candidate Blythin was in no proper position to exercise what appellate courts generally describe as the "discretion" of the trial judge.

That there was a close decision to make as to whether a verdict might have been directed in favor of petitioner cannot now be disputed. That the judge who made this decision, unpopular and final as it might have been, should have been free from any and all extrinsic influence is manifest upon the circumstances. That Judge Blythin did not meet these requisite qualifications is similarly manifest from the evidence accepted by the two lower courts.

The Court of Appeals has expressed the view that an arbiter of Judge Blythin's bent is nonetheless qualified to preside over a trial of such overwhelming proportions, and that the principles announced by this Court in decisions relating to the necessary impartiality of a trial judge were not in point. Thus the Court of Appeals has distinguished *Tumey* v. *Ohio*, 273 U.S. 510, *In Re Murchison*, 349 U.S. 133, and other cases on their facts and has held that they do not apply to the matter at bar. With this construction of the cited cases we respectfully disagree.

This Court did not hold, in either *Tumey* or *Murchison*, that demonstrable prejudice by a presiding magistrate was shown. Both cases stand for the principle that insofar as is possible, essential fairness demands that the judge have no substantial interest in the controversy over which he presides.

The fact that petitioner had a jury does not, we submit, eliminate this principle, as the Court of Appeals has ruled. This trial judge had far too much in his own hands to escape the requirement that he approach his task, however onerous, with a courageous determination to hew to the hard rule of law without one whit of thought to what the public might appreciate. The fact that there was a jury in this case was Judge Blythin's doing in the first place. The fact that the case went to the jury was Judge Blythin's doing in the second place. And the infinite number of times when he exercised his discretion—a discretion which the

Court of Appeals seeks to rely upon—cannot be assessed. We submit that:

(1) A judge who is up for election *during* an extremely controversial and publicly watched criminal case is not a fit magistrate to preside in such a case;

(2) A judge who, being up for election, is lauded by a newspaper which has a substantial pecuniary interest in the outcome of a criminal case is not a fit magistrate to preside in such a case.

(3) A judge who harbors a personal belief that an accused is "guilty as hell" before a trial over which he is to preside commences has an obligation to make such feeling known to the accused or his counsel.

(4) A judge who harbors a personal belief that an accused is "guilty as hell" before a trial over which he is to preside commences has an obligation to recuse himself *sua sponte*.

(5) A judge who personally believes that an accused has an "open and shut" case of guilt before the trial of such accused begins has an obligation to make such fact known to the accused or his counsel.

(6) A judge who personally believes that an accused has an "open and shut" case of guilt before the trial begins has an obligation to recuse himself *sua sponte*.

(7) A trial judge who, being assigned to preside over a circumstantial controversial case, finds that he is (a) up for election by popular vote during the trial, (b) his son is a member of the police team for the prosecution, (c) a newspaper with a substantial pecuniary interest in a conviction is backing such judge for re-election, (d) has a deep personal feeling that the accused is guilty, (e) has a firm personal belief that

the case over which he is to preside is "open and shut", is not a fit judge to preside over such case.

Petitioner thus respectfully submits that the writ ought to be granted upon the question of the trial judge's impartiality, in order that some rule may be had upon the fitness of a presiding justice who is himself so infected with preconception that he believes the defendant committed to his charge to be guilty, summarily, before the trial opens.

III. The Lie Detector Evidence

The stipulations show that (1) police officers testified that petitioner refused a lie detector test, and (2) that J. Spencer Houk (who was accused by Steve Sheppard of being the murderer) was allowed to testify that he had "taken" such a test, without giving the result. The District Judge held that such evidence violated petitioner's federal constitutional rights. The Court of Appeals did not hold that such evidence was *not* so prejudicial as to rise to the stature of a federal constitutional violation, but ruled instead that petitioner was estopped to complain because the receipt of such evidence was the considered tactical choice of petitioner's trial counsel.

Because no question has been raised as to the sufficiency of this event as a violation of the due process clause, we will not beleaguer this petition with the myriad cases which uniformly hold that the receipt of lie detector evidence is horrendous error in any trial.[13] We turn instead to an examination of the facts upon which the Court of Appeals has bottomed its holding that estoppel is appropriate.

The Court of Appeals said, in avoiding direct confrontation of this issue:

> "The conduct of defense counsel regarding lie detector testimony has been discussed at length because we believe it spares us the need of determining the precise constitutional question suggested by the opinion of the District Court." Rs 47.

The lower court held in effect that defense counsel's tardy objection to testimony that petitioner had refused a lie detector test by police, and the trial judge's failure to instruct that such refusal had no probative effect *in the face of a request to do so,* were not viewable as what might otherwise be constitutional violations because of the conduct of counsel.

We submit that this most erroneous approach, ignoring completely the doctrine of *Fay* v. *Noia,* 372 U.S. 391, distorts the facts which it purports to assert as its unbilical cord. When Mr. Corrigan tried to continue or change the venue of the Sheppard trial, he cited specifically the wide publication given petitioner's refusal to take a polygraph test from police. The evil inherent in such publication was carefully noticed by the District Judge. Ra 436a. When Mr. Corrigan was faced with a trial he did not want and did not believe could be fair from the outset, it is reasonable to assume that he determined to arrange his tactics nonetheless to persuade the jury he was forced to confront.

One must assume that he believed—for indeed he so asserted without equivocation—that each tales juror, and each petit juror, knew that Sam Sheppard had shunned the police polygraph. That he did not object to, and thus highlight, the offered testimony concerning the lie detector ought not to now be asserted as evidence that he wished the jury to know these facts. We think that under the circumstances his choice—if indeed any there was, as the Circuit Court has ruled—was necessary and involuntary. To rule that in the face of such obstacles as were thrust

upon petitioner's able trial counsel it was incumbent upon him to protect the record at the risk of paying an unwarranted penalty for the exercise of such right requires the imposition of a harsh and totally unrealistic rule of law. We suggest that the Court of Appeals has, in constructing its defense to this claimed error, woven a most unsavory mantle for the reluctant trial lawyer to wear. If in fact an advocate faced with trial before what he believes to be a hostile and tainted jury must, in order to protect his client's rights, abandon all hope of an acquittal on the merits and build a record for appeal, much has been taken from our inherent thought that ours is the world's finest system for the administration of justice. We respectfully suggest that the Court of Appeals has strained unreasonably to circumvent this most serious error; and that even assuming as true all that the Court of Appeals has said, the rule it has applied is repugnant to notions of due process as these have evolved in our jurisprudence.

The writ should be granted for review of this treatment of the consequences of evidence that the accused has failed to submit to a lie-detector test.

IV. The Telephone Calls By the Jurors During Deliberations

As the opinion of the Court of Appeals discloses, members of the Sheppard jury made certain telephone calls which were not authorized by the trial court. This was done in violation of two Ohio statutes. Section 2945.32, Ohio Revised Code, provides as oath to be administered to bailiffs in charge of a sequestered jury; it further provides that an officer violating this oath—as these officers did, unquestionably—may be punished by imprisonment for one to ten years. Section 2945.33, Ohio Revised Code, speci-

fically prohibits any communication to a juror by an outsider.

The Ohio Supreme Court, in reviewing this question, refused to apply the ordinary rule that proof of communication to a juror raises a presumption of prejudice which stands until rebutted. *State* v. *Sheppard*, 165 Ohio St. 293, 298-299; Ra 113a. The District Judge viewed this as a misapplication of Ohio law, but held that under the circumstances due process had been violated in any event. Ra 473a. The Court of Appeals rejected this ruling and held in essence that because defense counsel produced no actual evidence or prejudicial content in the telephone conversations, there was no error.

As the record discloses, the bailiffs from whose phones these calls were made did not dial the numbers or hear the voices of the parties called. In view of this we think the Ohio Supreme Court's pure speculation that these conversations were innocuous, and consisted of no more than "assurance of health and welfare" by the jurors' loved ones, to be completely unwarranted.

This was a case where the pressure on the jury must have been tremendous. The fact of prolonged deliberations had no doubt alerted the public to the fact that the case was a close one in the view of the jurors. And it is reasonable to believe that the "loved ones" of these jurors, during the period of sequestered deliberations, were being given an earful of opinion by all and sundry. Some of this opinion must certainly have advocated petitioner's conviction, and it is likely that the juror's families were apprehensive of community criticism in the event of an acquittal—especially in view of the "evidence" printed in the newspapers which never was produced in court.

Added to these tenuous circumstances is the fact that the largest holiday of the year was only a few days away. Anxious husbands and wives must have been concerned

about unfinished Christmas shopping and other festive preparations. To hypothecate that a tired and puzzled citizen forced to decide Dr. Sheppard's fate was not influenced by the still unknown content of these telephone conversations does a flat injustice to petitioner. Some inflection, innuendo, or subtle hint of encouragement by a juror's spouse could easily, even if subconsciously, have done much to tip the delicately balanced judgment of a juror troubled with some reasonable doubt.

To bolster its refusal to recognize felonious conduct by the keepers of the jury as a constitutional violation, the Court of Appeals has sought to once again penalize petitioner for what it describes as a procedural default on the part of his counsel inasmuch as they failed to produce evidence of the content of these telephone conversations. But under both Ohio law and the weight of authority (*State* v. *Adams*, 141 Ohio St. 423; *Emmert* v. *State*, 127 Ohio St. 235; *Mattox* v. *United States*, 146 U.S. 140) proof of communication between jurors and third persons is presumptively prejudicial till the contrary has been made to appear. Dr. Sheppard's counsel, therefore, had no reason or obligation. If these communications were in fact harmless, it was the duty of the State to prove such fact. Under all of the circumstances in which this jury deliberated this case, there is no possible justification for reversing the general rule and holding, as the lower court has done, that these conversations were presumptively non-prejudicial.

V. Other Constitutional Violations

The District Judge, after noting what he considered to be five individual violations of the federal constitution, concluded that it would not be necessary to review the other claimed errors. He pointed out, however, that some of these had "significant merit". Ra 476a. The Court of Appeals

purported to consider each of these, and rejected them all in one summary phrase. We contend that the violations claimed were not properly disposed of in such abrupt fashion, and that in any case some of these were sufficient to have required petitioner's release.

A. *Arraignment Without Counsel:*

The stipulations clearly show that Dr. Sheppard was arraigned on a capital charge without counsel to represent him. In *Hamilton* v. *Alabama*, 368 U.S. 52, 55, this Court said: "When one pleads to a capital case without benefit of counsel, we will not stop to determine whether prejudice resulted."

We think that these circumstances are more aggravated than those in *Hamilton*, for this petitioner had counsel, asked the arraigning magistrate to wait until counsel arrived before requiring petitioner to plead, and was refused with the directive, "You can see your lawyer in jail." Counsel was at that time en route to the town hall; for some reason many newsmen had been tipped in advance that Dr. Sheppard was to be arrested (only hours, of course, after the Cleveland Press had demanded an arrest), but counsel were not informed.

Although petitioner was later arraigned again with counsel after the indictment, we think that there is no clear reason why the principle of the *Hamilton* case ought not to be applied. The arrest was not legitimate; it was triggered not by evidence amounting to probable cause, but by editorial demands. Had Mr. Corrigan been present when petitioner was brought before the magistrate, he might have taken some step to halt the snowball which was even then gaining momentum rapidly in its course to bury the petitioner. There was no excuse for not waiting for counsel to arrive, except that possibly the presses were already rolling on a last edition with the big news.

B. *The Denial of a Peremptory Challenge:*

It is stipulated that after juror Manning was excused at the request of the prosecution and alternate juror Hansen was substituted in his place, defense counsel asserted their sixth and last peremptory challenge. This was denied them by the trial judge, and juror Hansen voted to convict.

This was a denial of the equal protection of the laws. This Court has made very plain the important nature of the right to peremptory challenge. *Pointer* v. *United States*, 151 U.S. 396. Six peremptory challenges were allowed petitioner by statute, Section 2945.21 Ohio Revised Code, supra, and the trial court arbitrarily abridged this right. On very similar facts Ohio had held years before that such abridgment was prejudicial error. *Koch* v. *State*, 32 U.S. 352.

We submit that the only reason why the trial judge refused this last challenge is because it would have left the jury with no alternates, and required a mistrial if a juror became disabled. He had the means to correct this situation, but chose instead to do so at petitioner's expense. This was discriminatory action under color of state law, and a violation of the Fourteenth Amendment to the Constitution of the United States.

C. *Spoliation—The Seizure of Petitioner's House and Concealment of Evidence:*

The stipulations disclose that (Ra 150a(9)) Bay Village Police Chief took the keys to petitioner's house, with petitioner's consent. The police concluded their investigation of the premises on August 16, 1954. On August 24, a written demand by petitioner that the house be returned to him was refused. At trial, the Chief was summoned to the stand, and defense counsel took the keys. The trial court ordered that they be returned, and that they belonged to

the police. The defense was thus denied investigative access to the house until after trial.

When the verdict had been returned, a criminologist named Dr. Paul Leland Kirk was hired to reconstruct the crime. By careful study of the blood spatter he was able to do just this, as his affidavit sets forth. Ra 150a (17). In addition to showing that the killer was left-handed (petitioner is not), Dr. Kirk discovered a large blood spot in the murder room which *did not come* from petitioner or his wife.

Had the jury which decided the case had this evidence, it is almost certain that they would have acquitted. Dr. Sheppard was pounded again and again by the prosecuiton for a lack of any proof to corroborate his "fantastic" story. This was such proof. When it was presented as grounds for a new trial, it was turned aside by Ohio Courts, principally on the ground that counsel had not tried hard enough to get the keys prior to the close of the evidence.

In view of the patently incorrect ruling by Judge Blythin that the keys belonged to the police, even though the prosecution had rested its case, we think that ruling of the Court of Appeals (Ra 90a) was wrong. But in any event, because their decision rests at least in part on the assertion of a procedural default against the petitioner—in circumstances where no waiver by him can possibly be found—it should be no bar in habeas corpus. *Fay* v. *Noia*, 372 U.S. 391. The Court of Appeals has left unillumined its reasoning in concluding that state action which deprives a defendant of exculpatory evidence is not an error of constitutional magnitude; but illumined or no, we suggest that such a view is incorrect.

D. *Conduct of the Ohio Supreme Court:*

The initial determination that there was sufficient evidence to warrant petitioner's arrest was made by Richard

Weygandt, then Law Director of Bay Village. Richard's father was Chief Justice Carl V. Weygandt of the Ohio Supreme Court. The Chief Justice disqualified himself, and then appointed his own replacement, in violation of the Ohio Constitution, Article IV, Section 2, which provides that when the Chief Justice is disqualified his replacement will be appointed by the Judge remaining with the longest period of service on the court.

The case was admitted to the Ohio Supreme Court on an Appeal as of Right, and Dr. Sheppard argued by brief twenty-nine errors of law. Three of these were stressed in oral argument, and only with these three did the majority opinion deal. Ra 110a. We think under the circumstances this was a failure of review, and a denial of the equal protection of the laws—especially in view of the fact that the Court was illegally constituted in the first place. These irregularities, when viewed against the total facts of the entire case, were sufficiently important to have warranted the attention of the Court of Appeals. The failure of that Court to deal with them has further deprived petitioner of the review to which he was entitled.

VI. The Sufficiency of the Evidence:

Petitioner claimed in his petition that the Ohio Supreme Court had used a constitutionally impermissible standard in determining that the trial record contained sufficient evidence to sustain the judgment of conviction. Ra 15a. The District Judge in disposing of the case specifically withheld judgment on this issue. Ra 403a. The Court of Appeals held that a reading of the opinion of the Cuyahoga County Court of Appeals showed that the record was not so devoid of evidentiary support as to violate due process. Rs 58. It is significant that the District Court was unwilling to subscribe to such a position. It is more signi-

ficant that no court in the entire chain of review of this case has been able to state the evidence which showed that petitioner killed his wife. We trace briefly the treatment of this issue in order to highlight the frail underpinnings of the judgment which has cost a citizen ten years of his life.

The first indication of the absence of any sound case against Dr. Sheppard is found in Prosecutor Mahon's attempt to sum up for the trial judge, at the close of the state's presentation in chief, the evidence which should bar a directed verdict. We have reproduced this argument in our appendix, because it clearly shows an absence of any legal proof to connect petitioner with the death. Rs 165. When Mr. Mahon had completed his efforts, Judge Blythin said:

> "I have one question: * * * is all this * * * equally as consistent with the innocence of Sam Sheppard as his guilt?" Tr. 5001; Rs .

Judge Blythin then ruled that this was a question for the jury, which it clearly was not. It is fundamental that evidence tending to support equally two inconsistent propositions is not proof of any kind, insufficient to support a civil judgment. He therefore avoided a critical ruling of law.

The Cuyahoga County Court of Appeals summarized at some length (Ra 63a-80a) the evidence in the case, but offered no rationale as to why such evidence might be viewed as excluding all reasonable hypotheses other than guilt. We strongly contend that this summary does *not* pass the initial barrier of showing a case "not so totally devoid of evidentiary support" as to violate due process.

The majority of the Ohio Supreme Court purported to confront this issue, but did not. It held that where a circumstantial case is submitted to a jury under proper instruc-

tions, a resulting conviction is ample proof that there was sufficient evidence. Ra 114a. This circuitous reasoning is totally invalid, for under such a rule no evidence at all would be necessary—only a proper charge by the trial court.

The dissent in the Ohio Supreme Court was, however, remarkable indeed. Judge Kingsley A. Taft (now Chief Justice Taft) expressed the opinion that not only had the state failed to prove guilt; it had in fact *proved innocence with its own evidence:*

> ". . . the state established by its evidence facts and circumstances which cannot be reconciled with any hypothesis other than defendant's innocence." Ra 119a.

We do not ask this Court to now review on certiorari the entire trial transcript is an effort to determine whether the record is barren of evidentiary support. But we do contend that if it were to be found that none of the other claimed violations are found to require issuance of the habeas writ, this issue has not been adequately litigated by a federal court. And certainly the paucity of relevant proof is of prime importance in assessing the prejudicial nature of the other errors, for on such a close question as this jury had before it seemingly minor irregularities in the proceedings could easily have influenced the verdict.

The "Great Writ" is certainly one of our noblest institutions, and its flexibility as a means to prevent unjust restraint has recently been re-emphasized by this Court. It has in many situations effectuated the release of criminal defendants where the record showed clear proof of guilt. But even though it reaches violations of important rights rather than errors of fact committed by juries, it can have no higher purpose than the release of innocent men wrongly incarcerated. Your petitioner sharply challenges the valid-

ity of the Ohio judgment in fact as well as in law, and vigorously contends that someone, somewhere, ought to be required to show proof of his crime which satisfied minimum requirements of due process. This has not been, and indeed cannot be, done.

VII. The Aggregation of Error

The majority of the Court of Appeals has held that where in its judgment none of the violations found by the District Judge rises to constitutional stature, the combined effect of these errors can be no greater than any of the individual claims. Rs 93. Judge Edwards in his dissent challenges this principle as incorrect, and maintains that possible constitutional violations must be viewed against the total background of the case.

We respectfully contend that the majority have committed fundamental error in their holding. Incidents such as the decisions below have reviewed cannot be fairly excised from the context in which they occurred, and judged in a vaccum. Nor can it be said that the combination of intrusions upon a defendant's rights can never be more grave than any of the parts.

The record we challenge is fairly riddled with error of every kind. Every basic element essential to a fair trial is shown to be lacking. The violations visited upon Dr. Sheppard are frequently interconnected with each other, showing a pattern of official conduct which time and time again fell below minimum standards of due process. The jury was tainted, the judge was biased, the prosecutor was unfair, the evidence was unfair and the reviewing courts of Ohio dodged and strained to pull together the shreds of a shabby conviction. If no single incident in these entire proceedings was sufficient to vitiate the conviction, certainly the aggregate is more than sufficient. With irregularities at

every turn, it cannot be said that this defendant had a fair trial.

A legal case must be viewed not only as a chain, but as a cable; and it is this which the Court of Appeals has failed to recognize. After examining what it saw as a chain, that court determined that none of its links, no matter how badly tortured and twisted, had actually snapped; thus the conviction could be held together. But this approach ignores the necessary corollary view that just as a cable which is so frayed that many of its strands are broken will not hold against its load, a trial peppered with errors of less than reversible magnitude is too infirm to warrant the deprivation of a citizen's liberty. Although we think that neither chain nor cable survives this record, we suggest that the Court of Appeals has made a serious jurisprudential mistake in holding as it did. Judge Weinman thought this trial to have been a "mockery of justice". Ra 476a. Against this view of the total matter, the Court of Appeals sought to whittle down, through the process of isolated dissection, the defects found. We respectfully contend that on this ground alone a writ of certiorari should be granted.

Conclusion

For the reasons stated above, petitioner respectfully suggests that a writ of certiorari ought to issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

No. 16077

United States Court of Appeals

FOR THE SIXTH CIRCUIT

SAMUEL H. SHEPPARD,
Petitioner-Appellee,
v.
E. L. MAXWELL, Warden,
Respondent-Appellant.

APPEAL from the U.S. District Court for the Southern District of Ohio.

Decided May 5, 1965.

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

O'SULLIVAN, Circuit Judge. Appellant, Warden of the Ohio State Penitentiary, appeals from a United States District Court order declaring void the 1954 conviction of petitioner, Dr. Samuel H. Sheppard. Judgment had been entered in the Court of Common Pleas of Cuyahoga County, Ohio, upon a jury verdict convicting Sheppard of the second-degree murder of his wife.[1] Upon his appraisal of

[1] Marilyn Sheppard, petitioner's pregnant young wife, was bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Dr. Sheppard told police that he had been wakened from his sleep on a couch in the downstairs living room by a noise or cry from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white "form" standing next to his wife's bed. He further stated that upon recovering, he pursued the form out of the house, to be again knocked out while struggling on the shore. The evidence disclosed that Dr. Sheppard had recently been unfaithful to his wife.

trial and pretrial publicity and other matters, the District Judge concluded that Dr. Sheppard did not have a fair trial and was thus deprived of rights guaranteed him by the United States Constitution. His order granted bail to Dr. Sheppard and released him from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954. Ohio was granted 60 days within which to take further action against Dr. Sheppard. *Sheppard* v. *Maxwell*, 231 F. Supp. 37 (July 15, 1964). This Court has stayed the order fixing such time limitation.

Sheppard's conviction and the denial of his motion for new trial on grounds of newly discovered evidence were both affirmed on appeal by the Court of Appeals for Cuyahoga County, Ohio. *State* v. *Sheppard*, 100 Ohio App. 345, 128 NE(2) 471 (1955); *State* v. *Sheppard*, 100 Ohio App. 399, 128 NE(2) 504 (1955). The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial in *State* v. *Sheppard*, 164 Ohio St. 428, 131 NE(2) 837 (1956), and affirmed the conviction in *State* v. *Sheppard*, 165 Ohio St. 293, 135 NE(2) 340 (1956), two judges dissenting. Application for certiorari was denied by the United States Supreme Court, *Sheppard* v. *Ohio*, 352 U.S. 910, 1 L. Ed.(2) 119 (1956), and rehearing was denied, *Sheppard* v. *Ohio*, 352 U.S. 955, 1 L. Ed.(2) 245 (1956). Dr. Sheppard's later petition to the Supreme Court of Ohio for a writ of habeas corpus was denied. *State, ex rel. Sheppard* v. *Alvis*, 170 Ohio St. 551, 167 NE(2) 94 (1960). Dr. Sheppard thus has had the benefit of all the processes of law provided by the State of Ohio, and the United States Supreme Court did not see fit to take the case for its review.

The habeas corpus proceeding here involved was commenced in the United States District Court April 11, 1963, charging, as amended, some 23 separate constitutional defects in Sheppard's conviction. Some of these had already

been found without merit by the Ohio Courts and others were new. Indicating his view that there were probably other constitutional imperfections in Dr. Sheppard's trial, the District Judge bottomed his decision on four separate grounds, (1) newspaper publicity before and during the trial denied Sheppard a fair trial, (2) the trial judge should have disqualified himself, (3) evidence that Sheppard had refused to take a lie detector test and that another witness had taken such a test was improperly brought before the jury, and (4) the bailiffs in charge of the jury after the cause was submitted to it improperly allowed individual jurors to make telephone calls to their families. Grounds 1 and 4 were passed upon in the Ohio Court of Appeals and Supreme Court and were found to be without merit. They were also relied upon in the application to the United States Supreme Court for certiorari, which was supported by the same volumes of newspaper publicity as are before us. Ground 2 and part of ground 3 were first asserted in the instant petition for habeas corpus.

We are of the opinion that the release of Dr. Sheppard was improvident, and that the District Court order should be vacated and Dr. Sheppard remanded to the custody of the respondent Warden of the Ohio Penitentiary.

Before detailed discussion of the issues before us, it should be preliminarily observed that Dr. Sheppard was released not because of any evidentiary showing that the jury was prejudiced by the newspaper and other publicity or that the trial judge exhibited partiality or prejudice in his conduct of the trial, nor because of any evidence that the jurors' calls to their homes contained any improprieties. The District Judge presumed that the judge and the jury must have been so affected by the publicity and other events as to be unable to discharge their respective responsibilities in keeping with constitutional standards. Reviewing substantially the same record as did the District

Judge here, the appellate machinery of Ohio, challenged to do so, was unable to discern the evils now presumed by the District Judge. Aware that as a matter of formal rule, denial of certiorari by the United States Supreme Court does not bespeak its approval of a state court decision, we do mention that critical points now made by Dr. Sheppard did not excite the Supreme Court to take for review this case now characterized by the District Judge as "a mockery of justice."

The District Judge's comprehensive and painstakingly prepared opinion exhibits his searching and laudable zeal to protect Dr. Sheppard's constitutional rights. He cast a wide and fine net over Dr. Sheppard's trial and its background, gathering in many imperfections each of which was found to have offended the United States Constitution.[2] This conclusion is reached notwithstanding that on the main points discussed some nine Ohio judges of the Common Pleas Court, the Court of Appeals, and the Supreme Court, did not find error or constitutional vice in the Sheppard trial and that the case "did not commend itself to at least four members of the [United States Supreme] Court as falling within those considerations which should lead this Court to exercise its discretion in review-

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[2] The District Judge said, "The Court . . . has found five separate violations of petitioner's constitutional rights, i.e., failure to grant a change of venue or a continuance in view of the newspaper publicity before trial; inability of maintaining impartial jurors because of the publicity during trial; failure of the trial judge to disqualify himself although there was uncertainty as to his impartiality; improper introduction of lie detector test testimony and unauthorized communications to the jury during their deliberations. *Each* of the aforementioned errors is *by itself* sufficient to require a determination that petitioner was not afforded a fair trial as required by the due process clause of the Fourteenth Amendment. And when these errors are cumulated, the trial can only be viewed as a mockery of justice. For this reason, it is not necessary to consider the remainder of the 23 stipulated issues, which range from having *significant merit* to no merit at all." 231 F. Supp. 71. (Emphasis supplied.)

ing a lower court's decision." *Sheppard* v. *Ohio*, 352 U.S. 910, 911, 1 L. Ed.(2) 119 (remarks of Frankfurter, J.). Other points now found to be of constitutional magnitude evidently did not appear of sufficient significance to prompt Dr. Sheppard's counsel to assert them as error on appeal.

Aside from the question of lie detector evidence, which we find without merit, the judgment of the District Court cannot be affirmed unless we are willing to accept its conclusion that the jurors who heard this case were, wittingly or unwittingly, false to their oaths; or that the trial judge, deceased before the start of this habeas corpus proceeding, was guilty of impropriety in sitting as a judge at the Sheppard trial. We cannot join in such conclusions, notwithstanding our agreement with the District Judge's characterization of the conduct of some of the Cleveland press as being shameful journalism, certainly not conducive to the judiciary's continuing concern for the freedom that the press insists should at all times be accorded to it. Contemporary American society would be greatly benefited if those members of the press and other media of information who offend in this regard were as conscious of and devoted to their responsibilities as they are solicitous that their privileges remain unimpaired. Good would also be the product of greater restraint by prosecutors and other members of the bar who indulge in public and truculent announcement of their trial plans and ammunition.

An initial question should be disposed of. The respondent warden now charges that the District Court was without jurisdiction to entertain the instant habeas corpus action, asserting that Dr. Sheppard has not exhausted remedies still available in the state courts of Ohio, citing 28 U.S.C.A. § 2254. He contends that application for delayed appeal is still available to petitioner under Ohio Revised Code § 2953.05 as to errors not already considered by the Ohio court, and that under Ohio Revised Code § 2725.02, habeas

corpus may also be presently employed to present federal constitutional questions to the Ohio courts. In his answer to the petition for habeas corpus, however, respondent admitted "that petitioner has exhausted all his remedies in the courts of Ohio. . . ." Whether such response constitutes a judicial admission foreclosing present consideration of the jurisdictional question and whether, assuming the court's right to now consider exhaustion of remedies, petitioner has exhausted his state remedies as required by 28 U.S.C.A. § 2254, are interesting questions. We pass them, however, believing that since the District Judge has entertained the application for habeas corpus and ruled on the merits, we have the right to, and should, dispose of the appeal before us on its merits. Particularly is that so since the result of our determination is in a sense a vindication of the state courts. Compare the Third Circuit rule that exhaustion is not required prior to a ruling against the merits of a state prisoner's petition, *United States ex rel. Drew* v. *Myers,* 327 F(2) 174 (CA 3, 1964); *In re Thompson,* 301 F(2) 659 (CA 3, 1962); *In re Ernst,* 294 F(2) 556 (CA 3, 1961), *cert. denied,* 368 U.S. 917 (1961).

We shall discuss the merits under the headings of Publicity, Disqualification of Judge Blythin, Lie Detector Evidence, Communications with Jurors, and Other Questions.

1) *Publicity.*

We should at the outset confess a certain temptation to yield to today's accelerating current of excitement and concern about undue press coverage of criminal charges and trials, and to affirm petitioner's release as dramatic vindication of the bar's contention that some of its own members and some of the various media of information have by misuse of their rights prevented our courts from according fair trial to all who are accused of crime. Doubts as to the efficacy and propriety of such action, however, are supplemented by the certain knowledge that it is our

duty as federal judges to avoid a state judgment of conviction only where some constitutional infirmity may be found. Careful consideration of this case leads to the conclusion that no such infirmity infects Dr. Sheppard's conviction. The frequently quoted prefatory paragraph to the opinion of Judge Bell, who wrote for the Ohio Supreme Court in affirming the conviction of Dr. Sheppard, provides appropriate introduction to the publicity aspect of the present case:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St. 294.

It should be observed here, however, that no rule of law, no procedural device, and no constitutional guarantee could then or now erase the murder of Dr. Sheppard's wife or its circumstances; such events inevitably cast the Sheppard trial into the setting so graphically described by Judge Bell. Judge Bell's accurate observation, in our view, merely demonstrates that the Ohio Supreme Court was fully aware of the subject before it. The fact that two of the Ohio judges dissented bespeaks the searching and vigor that must have attended the deliberations of the seven

judges whose decision ended Ohio's appellate review of the matter now before us.

The Supreme Court of the United States also had Judge Bell's preface before it. Justice Frankfurter recited it in full in his memorandum. The main points earnestly pressed upon the District Judge and this Court are not the belated discovery of Dr. Sheppard's present counsel.

Before examining in detail the nature of the publicity given Dr. Sheppard's case, it is well to note that he must carry the burden of demonstrating the constitutional vice in his conviction. As stated by the First Circuit in another publicity case, "the question whether jurors are impartial in the constitutional sense is one of mixed law and fact as to which the challenger has the burden of persuasion. . . ." *Geagan v. Gavin,* 292 F(2) 244, 246 (CA 1, 1961), *cert. denied,* 370 U.S. 903 (1962). This burden is one which must be carried " 'not as a matter of *speculation but as a demonstrable reality.*' " *United States ex rel. Darcy* v. *Handy,* 351 U.S. 454, 462, 100 L. Ed. 1331, 1338 (1956) (emphasis supplied); *Stroble* v. *California,* 343 U.S. 181, 198, 96 L. Ed. 872, 885 (1952). See also *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 281, 87 L. Ed. 268, 276 (1942).

Formally, the errors charged in this area of publicity are the District Judge's denial of motions for a change of venue, for a postponement of trial, and for mistrial.[3] It is

[3] A stipulation of issues in the District Court raised the questions whether petitioner's rights were violated by publication of a list of veniremen in advance of trial, or by the trial judge's failure to sequester the jury *sua sponte.* The District Judge stated these issues were considered under the publicity heading, and it appears that he found a deprivation of due process in each claim. We are unable to agree.

As a lawyer who through many years has observed the regular publication of the names of the venire in the local paper in advance of the term at which they were to serve, the writer of this opinion finds novel indeed the contention that "the publication of a list of veniremen thirty days in advance of trial, thus subjecting said veniremen to opinions of others during the thirty day period [was] a violation of petitioner's constitutional rights." Neither citation of authority nor

the law of Ohio that these are matters for a trial judge's discretion, not subject to review except for abuse thereof. *Townsend v. State,* 17 C.C. (N.S.) 380, 25 O.C.D. 408, *aff'd,* 88 Ohio St. 584, 106 NE 1083 (1913); *Richards* v. *State,* 43 Ohio App. 212, 215, 183 NE 36 (1932); *Dorger* v. *State,* 40 Ohio App. 415, 419, 179 NE 143 (1931), *appeal dismissed,* 124 Ohio St. 659, 181 NE 881 (1931), *cert. denied,* 284 U.S. 689, 76 L. Ed. 581 (1932); *State* v. *Stemen,* 90 Ohio App. 309, 310, 106 NE(2) 662 (1951), *cert. denied,* 342 U.S. 949, 96 L. Ed. 705 (1952); *State* v. *Deem,* 154 Ohio St. 576, 97 NE(2) 13 (1951); *State* v. *Sheppard,* 165 Ohio St. 293, 296, 135 NE(2) 340 (1956), *cert. denied,* 352 U.S. 910, I L. Ed. (2) 119 (1956). Such is the law in other states. 24A C.J.S. *Criminal Law* §§1864, 1865, 1866, p. 715 & n. 16 (1962). And dealing particularly with allegedly prejudicial publicity, this is the Federal rule as well. *Estes* v. *United*

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judicial reason is offered in support of this claim, and we find it unpersuasive.

We find equally unpersuasive the claim based on failure to sequester the jury. No formal request therefor was made at any time by the prosecution or defense. We cannot speculate now whether able defense counsel would have welcomed such a procedure, or whether long insulation and confinement of a jury trying a first degree murder case might be thought more likely to lead to conviction and a death penalty than permitting a jury the relaxation and refreshment of living at home, even with the possible exposure to extracurial publicity. Eminent advocates might be in disagreement on the point. *Cf. United States* v. *Provenzano,* 334 F(2) 678, 696 (CA 3, 1964), *cert. denied,* 379 U.S. 947 (1964). We cannot now speculate as to why defense counsel withheld such a request. There is no record to tell us whether the suggestion may have been made in Chambers and there opposed by defense counsel. That point was never made to the Ohio courts. And we will certainly not, in the context of this case and at this distance, find constitutional vice in the trial judge's failure to do what was not requested of him. Compare *Odell* v. *Hudspeth,* 189 F(2) 300, 303 (CA 10, 1951), *cert. denied,* 343 U.S. 873, 96 L. Ed. 656 (1951); *Wheeler* v. *United States,* 165 F(2) 225, 229 (CA D.C. 1947), *cert. denied,* 333 U.S. 829, 92 L. Ed. 1115 (1948); *Stephan* v. *United States,* 133 F(2) 87, 99 (CA 6, 1943), *cert. denied,* 318 U.S. 781, 87 L. Ed. 1148 (1943). It should be noted here that his failure to sequester the jury *sua sponte* was not charged as error on Sheppard's appeal.

States, 335 F(2) 609, 614 (CA 5, 1964), *cert. denied,* 379 U.S. 964 (1965); *United States* v. *Lombardozzi,* 335 F(2) 414, 416-17 (CA 2, 1964), *cert. denied,* 379 U.S. 914 (1964); *Hoffa* v. *Gray,* 323 F(2) 178 (CA 6, 1963), *cert. denied,* 375 U.S. 907 (1963); *United States* v. *Decker,* 304 F(2) 702, 704 (CA 6, 1962); *Bearden* v. *United States,* 304 F(2) 532 (CA 5, 1962), *vacated on other grounds,* 372 U.S. 252 (1963), *on remand,* 320 F(2) 99, 101-03 (CA 5, 1963), *cert. denied,* 376 U.S. 922 (1964); *Greenhill* v. *United States,* 298 F(2) 405 (CA 5, 1962), *cert. denied,* 371 U.S. 830 (1962); *Blumenfield* v. *United States,* 284 F(2) 46 (CA 8, 1960), *cert. denied,* 365 U.S. 812 (1961); *Dillon* v. *United States,* 218 F(2) 97, 103 (CA 8, 1955), *cert. dismissed,* 350 U.S. 906, 100 L. Ed. 796 (1955); *Kersten* v. *United States,* 161 F(2) 337 (CA 10, 1947), *cert. denied,* 331 U.S. 851, 91 L. Ed. 1859 (1947); *Shushan* v. *United States,* 117 F(2) 110 (CA 5, 1941), *cert denied,* 313 U.S. 574, 85 L. Ed. 1531 (1941); *United States* v. *Hirsch,* 74 F(2) 215, 218-19 (CA 2, 1934), *cert. denied,* 295 U.S. 739, 79 L. Ed. 1686 (1935).

In the case at bar, the trial judge held in abeyance the motions for change of venue and for continuance, advising that he would first by a voir dire examination determine whether a fair jury could be selected notwithstanding the alleged prejudicial publicity. Under Ohio law, this was proper procedure. Prior to Dr. Sheppard's conviction, the Ohio Supreme Court had approved a lower court statement,

> "The examination of jurors on their *voir dire* affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles and that the opinions so formed are not fixed but would yield readily to evidence, it is not error to overrule an

application for a change of venue." *Townsend* v. *State*, *supra*.

In sustaining the conviction of Dr. Sheppard, the Ohio Supreme Court said,

> "For example, in *Richards* v. *State*, 43 Ohio App., 212, 183 N.E., 36, it was held that the exercise of the right to order a change of venue lies in the trial court's discretion, and that a refusal to order a change of venue without prejudice until it can be determined whether a fair and impartial jury can be impaneled is not an abuse of discretion. . . .
>
> "If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.
>
> "In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this court can not say that the denial of a change of venue by the trial judge constituted an abuse of discretion." *State* v. *Sheppard*, 165 Ohio St. 296-97.

In determining whether Dr. Sheppard has carried the burden of demonstrating the unconstitutionality of his trial, surrounded as it was by pervasive publicity, it is our duty to review independently this voir dire examination of the prospective jurors in the state court. *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961); *United States ex rel. Bloeth* v.

Denno, 313 F(2) 364, 372 (CA 2, 1963), *cert. denied*, 372 U.S. 978 (1963); *United States ex rel. Brown* v. *Smith*, 306 F(2) 596, 602 (CA 2, 1962), *cert. denied*, 372 U.S. 959 (1963); *Geagan* v. *Gavin*, *supra*, 292 F(2) 246-47. The voir dire examination fills nearly 1600 pages in the record of the present case. Each prospective juror was questioned about his acquaintance with the pretrial publicity, and each of those who ultimately returned the guilty verdict swore that such publicity had created in his mind no opinion as to the guilt or innocence of the defendant and would not affect his deliberations. A reading of the voir dire discloses its thoroughness and careful inquiry as to any effect that publicity might have had on the veniremen. We find it without substantial fault and neither has counsel pointed to any insufficiency or impropriety in it. We indeed find no justification for present counsel's assertion that the City of Cleveland had been turned into a "jungle of wolves."[4] Our own review of the voir dire transcript makes it clear that the extensive questioning of each juror by the court and counsel, and the admonitions given them, forcefully impressed on their consciences their solemn responsibility and their duty to consider nothing but what properly came before them in the courtroom. Since it is obvious that this examination of the jurors affords no support for petitioner's position, the only part of the publicity question that remains in the case, as it has been

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[4] The trial judge's awareness of the importance of the voir dire is portrayed by the following admonition, given to some prospective alternate jurors:

> "A fair and an impartial juror is a juror who can sit here patiently and who can listen to all of the evidence that is produced in a case and to the instructions of the court as to the law applicable to the particular case, and who can honestly close out the rest of the world for the moment and bring a curtain down on all information he may have about the matter from other sources, and be guided entirely by the evidence and the instructions of the Court as to the law applicable to the particular case."

submitted to us, is whether there exists some basis for disregarding the jurors' unanimous sworn statements of impartiality. We are offered nothing to support a finding of mass perjury—or unwitting incompetence of the jurors to obey their oaths—beyond the nature of the publicity itself. The District Court ruled, however, that "This Court . . . has no compunction in finding that the publicity was so prejudicial to petitioner that *the assurance of the jurors must be disregarded.* . . ." 231 F. Supp. 59. (Emphasis supplied.) Summarizing this conclusion in different words, the opinion further states that "the prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions and instructions of the trial judge ." 231 F.Supp. 60. To evaluate this finding we must turn to a brief summary of the pretrial publicity involved. We need not choose between one gentle characterization of some of this publicity by the Ohio Attorney General as "nothing more than inane and innocuous reporting" and present counsel's borrowed condemnation of the Sheppard trial as " 'a God-damned shame.' " The District Judge's opinion details what we assume he considered the worst of it. From his recital and our own review, we attempt a general summary of its character. It began with the report of the murder of Mrs. Sheppard. The brutality of the murder and Dr. Sheppard's version of its bizarre circumstances combined to make it front page, headline news. This was as inevitable as the immediate speculation by officials and the public as to who had done it. Early news stories contained accounts of police efforts to question Dr. Sheppard and noted the fact that from the day of the murder he generally acted, and talked to police, only with the advice and direction of two lawyers, Arthur Petersilge and William Corrigan, the

latter a leader of the criminal bar of Cleveland. Throughout were many human interest stories laudatory of Dr. Sheppard's career. His own, his brother's and his attorneys' extensive exculpatory statements were also given front page prominence. Soon, however, and with increasing impatience, there began to appear news items evidencing the press' belief that Dr. Sheppard was being unduly sheltered. The Cleveland Press in particular became violently critical of what its editor considered a failure of police authorities to press investigation of the crime. It urged quick apprehension and "grilling" of the deceased's husband, who was at least once characterized as the "chief suspect." Dr. Sheppard's refusal to take a lie detector test was headlined, but attention was also given to his explanation that he felt that such testing could be misleading because of his emotional condition and his doubt of the reliability of such tests. It was intimated that Bay Village authorities, friendly to Dr. Sheppard, were joining his attorneys in surrounding him with undeserved protection. Certainly little sophistication was required for a reader to become aware that the Cleveland Press entertained strong suspicion that Dr. Sheppard had killed his wife, although at times the Press suggested that Sheppard should clear suspicion from himself by submitting to adequate questioning. All of this was indeed stated in more violent and colorful language than we employ in attempting to summarize it. Accompanying the accounts of the progress of the investigation were reports of Dr. Sheppard's steadfast denial of guilt and presumably accurate accounts of his own early, self-exculpatory narration of the events of the murder night. The press has always claimed the right to prod public officials, obedient to what it considers its high duty to protect the public weal; it frequently presses the exercise of this claimed right with crusading zeal. That it can be wrong and that often it

sacrifices good taste and fairness to circulation is rarely admitted by the fourth estate. Certainly the Cleveland Press' discharge of its claimed duty in the Shappard case could have been adequately pursued with less obtrusiveness. We need not here decide whether the Bay Village authorities, or the Cuyahoga County coroner or the Cleveland police did or did not need the urging provided by the Cleveland Press.[5] It has not been asserted that the police authorities were without the faults charged to them, although it might fairly be inferred that the Press' meddling probably impeded more than it helped.

It should be emphasized that nowhere in the news items is there any hint or suggestion that Dr. Sheppard confessed or admitted his guilt, or any claim that he had a criminal record or had been other than an exemplary citizen, or any clear assertion that the press or the police had any direct evidence of his guilt. Comments to the press by police officials, and even prosecutors, occasionally exceeded the bounds of propriety, but they too reveaied no more than that some though that Dr. Sheppard was guilty. In addition to the pretrial publicity set forth in the District Court opinion, the Cleveland papers also published items emphasizing Dr. Sheppard's protestations of innocence.[6]

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[5] The dissent states that a Cleveland Press representative made a public boast that his paper's handling of the Sheppard story produced the trial. Petitioner's brief makes such assertion but does not provide a supporting appendix reference.

[6] Samples of headlines in the Cleveland Press, the Cleveland News, and the Cleveland Plain Dealer are:

"Exclusive! 'I Loved My Wife—She Loved Me,' Sheppard Tells News Reporter."

"Dr. Sam Writes His Own Story."

"I am Not Guilty of the Murder of My Wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?"

"Sheppard Lawyers Hit Stories on Murder."

"Dr. Sheppard's Statement Issued to Answer Gossip."

We turn then to the two cases relied upon by the District Court in ruling that such pretrial publicity per se deprived petitioner of a fair trial, *Irvin* v. *Dowd*, 366 U.S. 717 (1961), and *Rideau* v. *Louisiana*, 373 U.S. 723 (1963). In each case the United States Supreme Court set aside state court convictions which had been affirmed in the highest courts of those states against charges of prejudicial publicity. It held that the prejudice in each case was so great that traditional voir dire procedures and admonitions were unavailing to insure a fair trial. It is clear that the publicity involved in these cases was significantly different from the publicity surrounding Dr. Sheppard. In *Irvin* v.

"Bay Doctor Talks to Reporter."
"Husband Puts $10,000 up For Slayer."
"Text of Doctor's Statement on his Offer of Reward."
"Doctor Will Help in Hunt for Death Weapon Today."
"Honored Athlete at Heights High."
"Dr. Sheppard Returns to Bay View Hospital to Treat his Patients."
"Drunk 'Confesses' but Story Fizzles."
"Dr. Sheppard Tells Press 'Killer Will Be Caught.'"
"Text of Statement by Corrigan After Arrest of Client, Dr. Sam."
"Police Cordial, Polite as They Take Sheppard."
"Family Points to Bay Man as New Suspect as Hoversten Talks."
"Dr. Sam is Anxious to Take Stand, His Brother Says."
"Battles Prowler in Bay. Corrigan Links Boy's Story With Sheppard Case."
"Dr. Steve Hits 'Red Herring' Accusation."
"Dr. Sam Just Like Brother, 2 Sisters-in-law Say at Trial."
"Dr. Sam Says: 'I Wish There Was Something I Could Say —But There Isn't.'"
"Jail Mate Says Dr. Sam Talks of His Innocence."
"Brother Says Police Aimed to Play on Dr. Sam's Concern."
"Brother Says Dr. Sam Anxious to Take the Witness Stand."
"Not Guilty, Sheppard Says; Asks No Bail."
"Can't Get Fair Trial—Dr. Sam."
"Own Sleuth Put on Case by Corrigan."
"Dr. Steve Challenges Prosecutor's Charge."
"Sheppard Home Bloodstains Are Proven Animal's." [By defense tests.]

These headlines were followed by text supporting Dr. Sheppard's claim of innocence.

Dowd, the Indiana court had denied a second change of venue. The Supreme Court recited these facts:

> "'Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vandenburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized, *stating that the petitioner had confessed to the six murders.*'
>
> ". . . curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. . . . These stories [newspaper, radio and T.V.] revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced *his confession to the six murders* and the fact of his indictment for four of them in Indiana. They reported *petitioner's offer to plead guilty* if promised a 99-year sentence, but also *the determination*, on the other hand, of the

prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the *modus operandi* of these robberies was compared to that of the murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. . . . On the day before the trial the newspapers carried the story that Irvin *had orally admitted the murder of Kerr* (the victim in this case) *as well as 'the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky.'* " 366 U.S. 719-20, 725-26. (Emphasis supplied.)

Turning then to the attempt to select an impartial jury, the Supreme Court went on:

"The panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were preemptorily challenged by petitioner and 10 by the State; 12 persons and two alternates were selected as jurors. . . . An examination of the 2,783-page *voir dire* record shows that 370 prospective jurors or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opinion) entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty." 366 U.S. 727.

"Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community . . . was clearly reflected in the sum total of the *voir dire*

examination of a majority of the jurors finally placed in the jury box. *Eight out of the 12 thought petitioner was guilty.*" Ibid. (Emphasis supplied.)

Coming to the other case chiefly relied upon by the District Court, *Rideau* v *Louisiana,* we find its facts, like those in *Irvin* v. *Dowd,* gravely undermine any claim that it supports Dr. Sheppard's position. *Rideau* also involved a state court's denial of a motion for change of venue, made on the ground that public knowledge of the crime in the parish prevented the selection of an impartial jury. The Supreme Court's following recital of the facts at once exposes its inappositeness here.

"On the evening of February 16, 1961, a man robbed a bank in Lake Charles, Louisiana, kidnapped three of the bank's employees, and killed one of them. A few hours later the petitioner, Wilbert Rideau, was apprehended by the police and lodged in the Calcasieu Parish jail in Lake Charles. The next morning a moving picture film with a sound track was made of an 'interview' in the jail between Rideau and the Sheriff of Calcasieu Parish. This 'interview' lasted approximately 20 minutes. It consisted of interrogation by the sheriff *and admissions by Rideau that he had perpetrated the bank robbery, kidnapped, and* murder. Later the same day the filmed 'interview' was broadcast over a television station in Lake Charles, and some 24,000 people in the community saw and heard it on television. The sound film was again shown on television the next day to an estimated audience of 53,000 people. The following day the film was again broadcast by the same television station, and this time approximately 29,000 people saw and heard the 'interview' on their television sets. Calcasieu Parish has a population of approximately 150,000 people.

* * * * *

> "*Three members of the jury which convicted him had stated on* voir dire *that they had seen and heard Rideau's televised 'interview' with the sheriff on at least one occasion. Two members of the jury were deputy sheriffs of Calcasieu Parish.* Rideau's counsel had requested that these jurors be excused for cause, having exhausted all of their peremptory challenges, *but these challenges for cause had been denied by the trial judge.*" 373 U.S. 723-25. (Emphasis supplied.)

Mr. Justice Stewart, after observing that "the plan [the filming of the confession and its telecast] was carried out with the active cooperation and participation of the local law enforcement officers," concluded that "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, . . . due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.' "

We are of the opinion that neither *Irvin* nor *Rideau* support a holding that the jurors' testimony had to be rejected by the trial judge and that a fair jury could not possibly have been obtained in this case.

In *Irvin*, the Court was dealing with a case where eight of the twelve jurors thought the defendant guilty, some of them stating that evidence would be needed to overcome this belief. The basic thrust of the Court's holding is found in its conclusion that "it would be difficult to say that each [of the eight opinionated jurors] could exclude this preconception of guilt from his deliberations." It was only against this background that the Court ruled that the trial court should have rejected the jurors' statements that they could render an impartial verdict despite their opinions. These vitiating opinions, moreover, were formed on the basis of publicity not only of Irvin's criminal record, but of statements that he had actually confessed to several

murders, including the one for which he was convicted. In the present case, the publicity contained accusation only by innuendo. So far as *Irvin* is concerned, indeed, it would seem that Dr. Sheppard was accorded rather more than the constitution requires, for each of the twelve jurors who voted to convict him testified they were entirely free of any opinion as to his guilt or innocence. The Court in *Irvin,* by way of contrast, ruled that

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to estabish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

Irvin, we think, provides no basis for ruling that the publicity in the present case was such as to "rebut the presumption of a prospective juror's impartiality."

The facts of *Rideau* set it even further apart from Dr. Sheppard's case. To ask three jurors to put entirely aside the visual spectacle of a confession by the very defendant they are charged to presume innocent is indeed close to demanding the impossible. To believe that the balance of that jury could remain ignorant of what their fellow jurors knew would be folly. It was far different, and we think not unreasonable, to ask a jury to ignore the suspicions and accusations of the press in deliberating Dr. Sheppard's guilt or innocence. Compare *Bearden* v. *United States,* 320 F(2) 99, 101-103 (CA 5, 1963), *cert. denied,* 376 U.S. 922 (1964).

While it was not expressly relied upon by the District Court, we believe that the decision in *United States ex rel. Bloeth* v. *Denno,* 313 F(2) 364 (CA 2, 1963), *cert. denied,* 372 U.S. 978 (1963) is distinguishable upon the same grounds as *Irvin and Rideau.*

Other cases relied upon by the District Court, *Delaney* v. *United States,* 199 F(2) 107 (CA 1, 1952); *Marshall* v. *United States,* 360 U.S. 310 (1959); *United States* v. *Accardo,* 298 F(2) 133 (CA 7, 1962); *Krogmann* v. *United States,* 225 F(2) 220 (CA 6, 1955), are all immediately distinguishable as cases involving the exercise by federal appellate courts of their *supervisory power* over trials in the district courts. But they are further distinguishable on their facts. In *Delaney* the pretrial publicity about an accused Collector of Internal Revenue, Delaney, included extensive coverage of public hearings before a congressional subcommittee investigating his alleged criminality and misfeasance which the court said "afforded the public a preview of the prosecution's case against Delaney," without the safeguards of a trial. It included evidence of Delaney's bankruptcy, charges of larceny and embezzlement, and a public announcement by the committee chairman referring to the "deplorable activities of . . . Mr. Delaney" and the committee's effort to find out "why this betrayal has occurred." The court further emphasized that the federal government, prosecutor in the criminal case, was itself responsible for much of the publicity. In *Marshall,* publicity appeared during the trial which included information of alleged previous felony convictions involving forgery, of previous violation of the drug laws, and of an identification of Marshall as one who had prescribed restricted drugs "for Hank Williams before the country singer's death." The defendant did not take the stand, but all of the above was admittedly communicated to several members of the jury through news accounts. The Supreme Court was careful to point out that reversal was "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts. . . ." In *Accardo* the accused did not take the stand, but the newspapers published accounts of

his criminal record and other inflammatory material comparing Accardo with Capone and calling him "the master of muscling legitimate business." Also the court found inadequate the district judge's admonitions to the jury to avoid all news accounts of the case. In *Krogmann* the offending publicity erroneously asserted that one of the defendants had admitted the offense charged during his trial testimony and this Court, exercising its supervisory power, found error in the trial judge's handling of the matter after discovering that two of the jurors had read the accounts. Our review of these last considered cases leaves us unconvinced of their importance to the issue before us.

We have emphasized above that the publicity involved in the present case was not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media. But neither was it of a nature calculated to create lasting opinions as to Dr. Sheppard's guilt. Surmise, conjecture, and accusation were substituted for confession, criminal record, or direct evidence. We are not prepared now to hold that American citizens have so far forgotten their traditional heritage of "fair play" that such shabby reporting would irretrievably infect the minds of an entire metropolitan community. Our jury system cannot survive if it is now proper to *presume* that jurors, selected with the care taken in this case, are without the intelligence, courage and integrity necessary to their obedience to the law's command that they ignore the kind of publicity here involved. We are left rather in the position of the Court in *Beck* v. *Washington*, 369 U.S. 541, 557 (1962), where "we cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law."

Our negative holding that Dr. Sheppard has not demonstrated an adequate basis in the pretrial publicity for disregarding the jurors' assertions of impartiality would be sufficient to dispose of this aspect of his petition. We prefer, however, to emphasize the affirmative reasons for refusing to ignore those assertions. Federal courts frequently employ the very tactic here employed by Judge Blythin, postponing their rulings on motions for change of venue until an attempt to impanel a jury has revealed whether it is possible to find impartial jurors. *E.g., Hoffa* v. *Gray*, 323 F(2) 178, 180 (CA 6, 1963), *cert. denied*, 375 U.S. 907 (1963); *Blumenfield v. United States*, 284 F(2) 46, 51 (CA 8, 1960), *cert. denied*, 365 U.S. 812 (1961); *United States* v. *Kline*, 205 F. Supp. 637, 638 (D. Minn. 1962); *United States* v. *Hoffa*, 156 F.Supp. 495, 499 (S.D. N.Y. 1957); *United States* v. *Dioguardi*, 20 F.R.D. 33, 36 (S.D. N.Y. 1956); *United States* v. *Dioguardi*, 147 F.Supp. 421, 422 (S.D. N.Y. 1956). The trial judge in such a situation is in the best position to evaluate the testimony of prospective jurors, and accordingly it is he who must bear the brunt of determining whether a fair trial is possible. *Wolfe* v. *Nash*, 313 F(2) 393, 397 (CA 8, 1963), *cert. denied*, 374 U.S. 817 (1963); *Mayo* v. *Blackburn*, 250 F(2) 645 (CA 5, 1957), *cert. denied*, 356 U.S. 938 (1958); *United States* v. *Bardo*, 244 F(2) 833, 838 (CA 2, 1957), *cert. denied*, 355 U.S. 844 (1957). As stated by the court in the *Mayo* case,

> "Whether the adverse publicity prevented the appellee from securing a fair trial was a question primarily addressed to the judgment of the trial court. . . . It properly accorded weight to the examination of the jurors on voir dire and to the lack of difficulty in choosing a jury. . . . It was on the ground at the time of trial; it saw and heard the voire dire examination of the jurors; it was in much better position to know

> the local sentiment and to hear and decide the motion for change of venue than was the federal district court." 250 F(2) 648.

After the jury had been selected and before the examination of prospective alternate jurors, Judge Blythin again overruled the motions for change of venue or a continuance, stating that

> "the best evidence in the world is the effort to select a jury, and what we get here in a picture that has taken almost two weeks of time. The Court is thoroughly satisfied that we have here a fair and impartial group of people to try this case, and I doubt if under any conditions at any time anywhere in this state you could have a better looking group of people and a more intelligent group of people, as a whole, to try a case of this kind, and the Court is thoroughly satisfied that they are a group of fair and impartial people who can properly try this case under the guidance of the Court, and I hope we will be able to give them that in the manner that it ought to be given."

Our examination of the entire record leaves us convinced that there is no basis for rejecting this considered judgment by the one judge most qualified to make it.

Pretrial publicity is not the only focus of the District Court's ruling that the news media deprived Dr. Sheppard of a fair trial. The widespread publicity surrounding the trial itself is also summarized in the opinion below, outlining articles which for the most part involve reporters' recitation of evidence given and events occurring at the trial. One article reported that a prospective witness would testify that Marilyn Sheppard had referred to her husband as a "Dr. Jekyll and Mr. Hyde." This witness did testify, but did not disclose such an incident. Aside from

this article, it is not claimed that however colorful, the accounts of the trial were substantially inaccurate.

We feel no need to expand on the nature of this trial publicity, for petitioner's claim of constitutional error on this account is controlled by considerations rather different from those we have just explored. Varying degrees of exposure to the pretrial publicity were admitted by the jurors on voire dire, but with the single exception of the Winchell broadcast noted below there is no specific showing that any of the jurors had any contact with the trial publicity.

Petitioner emphasizes one article appearing during the trial entitled "But who will speak for Marilyn?" Whether we borrow the Ohio Attorney General's words and characterize this effort at impassioned prose as "inane and innocuous" reporting, or as the author's amateurish reach for immortality, we have more confidence in American jurors than to believe they would be made faithless to their oaths by reading it, *if in fact any of them did.*

Our own review of the record in this case discloses that the trial judge, from the beginning of the trial to its end, repeatedly employed traditional admonitions to the jury reminding them of their duty and oath to hear and try the case before them solely upon the evidence adduced in the courtroom. Because of its thoroughness, we set out in full an early charge to the whole jury:

> "And will you, ladies and gentlemen, be kind enough again to observe the caution which the Court has heretofore expressed to you? And I will repeat it again for the benefit of the two new jurors who have come, alternate jurors who have come into the picture.
>
> "You are not to talk about this case to anyone. You are not to permit anyone to talk about it to you. You are not to remain anywhere where other people are

talking about it among themselves. You are not to talk about it among yourselves, in your jury room or elsewhere.

"It is your duty as an individual juror and responsible citizen to keep your own counsel, to listen to the evidence that comes from the witness stand and the instructions of the Court as to the law and wait until all those are complete before you form any opinion or judgment whatever as to the outcome of this case, which opinions and judgments are to be expressed only in your jury room after the case has been finally submitted to you for deliberation and decision.

"I would suggest to you, too, and this is particularly directed to those who have come in today, that you do not during the pendency of the trial listen to comments about it over the radio or otherwise and do not read newspapers. Have somebody preserve those for you, and you can read them—that is, as far as this case is concerned—have the reports of this case taken out and have them preserved for you, and you may read them to your heart's content after this case is disposed of. I say that because I think you will feel better and you will be better.

"Mr. Corrigan [Chief defense counsel]: May I have the Court state to the jury that they will know more about this case than what will appear in the newspapers?

"The Court: Yes, indeed. You understand, ladies and gentlemen, the entire community has had through news media of this kind, that kind and the other, and discussion by people who really know nothing whatever about the case, probably, and there have been all kinds of things floating around, there is no dispute

about that anywhere, but you will get here the only facts that you are to consider in the determination of this case. They will be presented by the State, and then the defense will have its opportunity to present its views, if there are views to be then presented, and let us be sure that we are relying on what we hear from official authoritative sources and rely on those entirely in our consideration and decision of this case. Let's forget all about what has been floating in the community. We are now to the serious business of ourselves determining what the facts really are, and we will get that from this witness stand and on the basis of the rules of law that the Court will give you.

"Without any formality—does that cover what you wanted?

"Mr. Garmone [Defense counsel]: Yes.

"The Court: Does that cover what you wanted?

"Mr. Corrigan: Yes that's what I wanted covered, your Honor. Thank you."

Abbreviated repetitions of this admonition were made throughout the trial whenever the jury recessed, usually in the form of the statement that they were to remember the court's admonition and refrain from discussing the case, even among themselves. We find no instances where defense counsel expressed dissatisfaction with the adequacy, style or frequency of the court's admonitions in this regard. Neither does present counsel point to any such insufficiency.[7] Protest was voiced only when the court

[7] The dissenting opinion in this case, however, now characterizes such admonitions as "equivocal and inadequate," and also as "infrequent and equivocal." It has not been pointed out to us that in any of the many attacks on the Sheppard conviction have his able and aggressive counsel ever made such a charge. We are satisfied that the jury readily understood the judge's admonitions and that the dissent's charge of "equivocation" is not justified.

refused to interrogate the jury as to the Considine broadcast discussed below, and when it refused the motions for mistrial.

The District Court has here presumed prejudice from the publicity accorded Dr. Sheppard's trial. We believe that the presumption should be to the contrary, that the jury is assumed to have obeyed the instructions to avoid all contact with publicity concerning the case before them until some contrary showing has been made. *E.g., Estes* v. *United States,* 335 F(2) 609, 615 (CA 5, 1964), *cert. denied,* 379 U.S. 964 (1965); *United States* v. *Agueci,* 310 F(2) 817 (CA 2, 1962), *cert. denied,* 372 U.S. 959 (1963); *Rizzo* v. *United States,* 304 F(2) 810, 815 (CA 8, 1962), *cert. denied sub nom. Nafie* v. *United States,* 371 U.S. 890 (1962); *Cohen* v. *United States,* 297 F(2) 760, 764 (CA 9, 1962), *cert. denied,* 369 U.S. 865 (1962); *Holmes* v. *United States,* 284 F(2) 716, 718 (CA 4, 1960). The rationale for this presumption was stated in somewhat different words by Mr. Justice Holmes more than a half-century ago: "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt* v. *United States,* 218 U.S. 245, 251, 54 L. Ed. 1021, 1029 (1910).

The presumption that obedient to instructions, the jurors ignored publicity during the trial has not been overcome by petitioner. The only showing that any of them encountered any of this publicity came when the trial judge questioned the jurors about a Winchell broadcast during the trial attributing marital infidelity to Dr. Sheppard. Two jurors advised that they had heard the broadcast, but would not be influenced by it, and an appropriate admonition on the subject was given by the judge. Defense counsel also requested interrogation of the jury as to their knowledge of another broadcast in which one Considine

made remarks derogatory to Dr. Sheppard. The trial judge refused this request, observing that he did not think the jury should be harassed with interrogation each morning. We believe that this action was itself within the discretion of the judge, and that it may indeed have been the best thing to do. A discreet judge might well conclude that repetitive reference and inquiry as to matter prejudicial to the defense would harm rather than help. A substantial number of lawyers skilled in the art of advocacy would, we think, agree. Compare *Estes* v. *United States*, 335 F(2) 609, 615 (CA 5, 1964), *cert. denied*, 379 U.S. 964 (1965); *United States* v. *Provenzano*, 334 F(2) 678, 696 (CA 3, 1964), *cert. denied*, 379 U.S. 947 (1964); *Ford* v. *United States*, 233 F(2) 56, 61-62 (CA 5, 1956), *cert. denied*, 352 U.S. 833, 1 L. Ed. (2) 53 (1956). In any event, any effect that this limitation of interrogation during trial might be thought to have is dissipated by the opportunity accorded defense counsel to interrogate jurors on their motion for a new trial. Three of the jurors were thus questioned, but counsel did not see fit to inquire into possible contacts with trial publicity.

On the basis of the record now before us, we can only guess whether the jurors violated the instructions to avoid publicity about the trial in any significant degree. In view of the presumption that such instructions were obeyed, we must hold that petitioner has failed to carry the burden of demonstrating a denial of due process in the trial publicity.

The District Judge also concluded that news coverage of the trial deprived petitioner of his constitutional rights because it contributed to a "carnival atmosphere." Stress is laid on the manner in which the trial judge allocated the seating available in his small courtroom, giving most of it to the press and installing special tables for them. Now, with the reflection and the hindsight that an interval of

ten years has provided, and after all of the appellate tribunals have found the judge's conduct in this regard without constitutional fault, it is asserted that the trial judge should have done a better job. We are not told what alternative measures he should have adopted. Certainly he was without power to slake the public interest. Should he then have selected news representatives who would be regularly favored with admission to the courtroom, and let each day's trial begin with a scramble by the unfavored to gain access? Should he have moved the trial out of the courtroom into some public hall or auditorium where the public and the press could be accommodated at a greater distance from the jury and counsel? Shall we now speculate whether such planning would have reduced or augmented the so-called "carnival atmosphere?" It is asserted also that too many photographs were taken of the jury, the defendant, and counsel. No photographs were allowed to be taken in the courtroom while the court was in session. In view of today's increasing dissatisfaction with the aggressive performance of many of the news media, it may indeed be regretted that the trial judge did not enforce more rigid discipline of its representatives. But we can no more find impropriety of constitutional magnitude in what occurred than could the other appellate courts that have been challenged to do so.

The claim that the trial judge contributed to a "carnival atmosphere" is further supported by emphasis on the installation in the courtroom of a microphone and loud speakers. This is surprising in view of the fact that it has become regular practice to install such electronic equipment in modern courtrooms, including those occupied by the United States District Courts. We find no merit in this claim.

The opinion of the District Court additionally criticizes activities of the press as follows:

> "The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting. Also, the newspapers ran editorials praising the trial judge (he was a candidate for re-election) and published photographs and sketches of him in at least 46 separate issues. *This was certainly an attempt to bring him around to their way of thinking.*" 231 F. Supp. 63. (Emphasis supplied.)

Even if we were to join in the apparently gratuitous inference as to the press' motives, we have just examined the reasons why we cannot join in the presumption that the jurors violated their oaths and instructions by examining the trial publicity.[8] Nor are we willing to assume the judicial venality or timidity we would have to assume to find any effect of such publicity on the judge in the face of a record which is entirely devoid of any evidence of trial misconduct on his part.

We ponder whether the flamboyant and sometimes shabby pretrial exhibitions of the press in this case would have had a greater tendency to predispose prospective jurors to an early suspicion of guilt of the accused than the news that a grand jury had indicted him followed by his arrest and being required to stand trial for murder. Are the procedures of our American courts, which we justly boast to be the fairest in the world, without power to seat an impartial jury notwithstanding its previous knowledge than an earlier jury of the accused's peers, a

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[8] The dissent mentions photographs taken of the home and family of juror Mancini while she was away at the trial. It should be noted that Mrs. Mancini was an alternate juror, discharged before the start of the jury's deliberations. This picture taking enterprise, however, does portray the brashness of some of today's news photographers.

grand jury, had by its indictment accused him of murder? We do not think so.

More fundamentally, we are struck by the difficulty some ten years after the trial of indulging in the proposed speculation that had it been held in some other county in Ohio, the interest of the press, the radio and T.V. would have subsided, or that the citizens of some rural county would be less interested in the colorful events involved than their brothers in the big city. Was the interest in the long ago Scopes trial less because it was held in a rural area of Tennessee? Had the trial judge here decided to postpone the trial a month, six months, or a year, would not fresh and more colorful cries of righteous indignation be heard from all of today's media of information? Whither in time or place should a court run to attempt to seat a jury completely disinfected of all news, and at the same time intelligent? Compare *Rees* v. *Peyton,* 341 F(2) 859, 863 (CA 4, 1965); *United States* v. *Cohn,* 230 F. Supp. 589, 590-91 (S.D. N.Y. 1964). Should a Federal Judge now speculate whether change of scene or postponement might have offered a way to administer some judicial catharsis to cleanse away all that prospective jurors might have seen, read, or heard about a matter of such interest as the killing of Mrs. Sheppard? We do not think that such speculative review of the trial judge's discretion should now be indulged in the context of this case.

Judge Blythin summed up his own estimate of the situation in the following language:

> "We can't control publicity, and I do not believe that you will ever end the publicity in this case until you end the trial of this case, and I think perhaps it is our duty to put that business in reverse and proceed on a business-like, fair, honest, legal basis to try the case and have it disposed of in the interest of the State and certainly it is in the interest of Sam Sheppard to

know whether a fair and impartial jury would declare him guilty or not guilty on the evidence which will be here produced. . . ."

We hold that petitioner failed to meet his burden of proving that the pretrial and trial publicity discussed above denied him due process of law or its equal protection.

2) *Disqualification of trial judge.*

The District Judge held that petitioner's constitutional rights were violated because the trial judge failed to recuse himself *sua sponte* from presiding at the Sheppard trial. The basis of this conclusion was some pretrial remarks which Judge Blythin is alleged to have made, indicating his belief that Sheppard was guilty. As in the case of the alleged prejudice of the jury, partiality and bias of the trial judge have been *presumed* without any proof that the trial judge did or said anything in the conduct of the trial that could be attributed to or which demonstrated prejudice against the petitioner.

The material from which this finding was made came to light after the instant petition for habaes corpus was filed. There was put in evidence a statement of a New York columnist, one Dorothy Kilgallen Kollmar, wherein she stated that at the beginning of the trial she was invited into the Chambers of Judge Blythin and there told of the judge's belief that petitioner was "guilty as hell. There is no question about it." The full account of this alleged and interesting interview is set out in the District Court's opinion, 231 F. Supp. 64-65.[9] No denial of this conduct was made because the only one who could have done so,

[9] No explanation was offered to the District Court as to why disclosure of this unusual conduct of a judge of unimpeached reputation awaited his death. The accusation of the columnist was not made before the District Judge. It was contained in a statement agreed to have the "status of a deposition" and also, by agreement of counsel, no oath was administered "since the integrity of the witness is not in dispute." She was not cross-examined.

Judge Blythin, had been long dead when he was thus accused. The District Judge seemed to believe that with Judge Blythin's voice stilled by death, this recitation of his statements became "uncontroverted evidence in this case and must be accepted as being true."

A similar charge was made against Judge Blythin by one Edward T. Murray, an employee in the office of the Clerk of the Common Pleas Court of Cuyahoga County at the time of the Sheppard trial. His statement was that during a discussion of the Sheppard case in July, 1954, prior to the trial, Judge Blythin remarked that "Sam Sheppard was as guilty as he was innocent." As in the case of the first discussed accusation, no corroboration or denial of the charge could be provided because the only identified witness to the occurrence, a lawyer by the name of Maher, had, like the accused judge, long since died and the accuser's memory failed him as to the identity of "three or four" other people present.[10]

We believe that the District Judge was under a misapprehension in assuming that because Judge Blythin could not answer the charges against him, such charges constituted "uncontroverted evidence" that Judge Blythin had made the statements attributed to him. There are many circumstances in which testimony need not be accepted even though formally uncontradicted. *E.g., Quock Ting* v. *United States,* 140 U.S. 417, 420-22, 35 L. Ed. 501, 502-03 (1891); *Scates* v. *Isthmian Lines, Inc.,* 319 F(2) 798, 799 (CA 9, 1963); *Ramos* v. *Matson Nav. Co.,* 316 F(2) 128, 132 (CA 9, 1963); *D'Orsay Equip. Co. v. United States Rubber Co.,* 302 F(2) 777, 779-80 (CA 1, 1962); *Powers*

[10] As in the case of Dorothy Kilgallen, Mr. Murray was not put under oath and gave no explanation of the long interval between the event and its disclosure. Neither did he explain why he could recall the identity of one witness, unavailable because of his death, but could not recollect the other witnesses who might be living and available.

v. *Continental Cas. Co.*, 301 F(2) 386, 388-89 (CA 8, 1962); *Wooley* v. *Great Atl. & Pac. Tea Co.*, 281 F(2) 78, 80 (CA 3, 1960); *Hasson* v. *C.I.R.*, 239 F(2) 778, 782 (CA 6, 1956); *Andrew Jergens Co.* v. *C.I.R.*, 125 F(2) 686, 689 (CA 6, 1942); *Goodyear Tire & Rubber Co.* v. *FTC*, 101 F(2) 620, 624 (CA 6, 1939), *cert. denied*, 308 U.S. 557, 84 L. Ed. 468 (1939); 8 Cyclopedia of Fed. Proc. § 26.98 (3d ed. 1951); 11 Id. § 47.161 (3d ed. 1963); 7 Wigmore, Evidence, § 2034, pp. 260-63 (3d ed. 1940). Manifold reasons for rejecting the "uncontroverted" statements adduced by petitioner exist in the present case. Whether offered to prove the matter asserted or merely the fact of assertion, testimony as to the uncorroborated oral statement of a deceased person is the weakest form of evidence, viewed with suspicion and subject to close scrutiny. "The courts consider with suspicion, or lend a reluctant ear to, statements as to what a deceased person may have said, especially when corroboration is lacking." 31A C.J.S. *Evidence*, § 266, p. 689. Such statements "are regarded as of comparatively little probative value. . . ." 20 Am. Jur. *Evidence*, § 1196, p. 1048, and ". . . courts of justice lend a very unwilling ear to statements of what dead men had said," *Lea* v. *Polk County Copper Co.*, 62 U.S. (21 How.) 493, 504, 16 L. Ed. 203, 207 (1859). Whether the habaes corpus factfinder be persuaded by the polite language of the Ohio Attorney General that "even the best of memories wane dim to some extent" or cared to find inherently incredible the stories told by Judge Blythin's accusers or be satisfied that they did not overcome the presumption of the regularity of the deceased trial judge's conduct, he was at liberty to withold his conviction of Judge Blythin in this regard. There is, moreover, much to contradict these "uncontroverted" statements, which are entirely inconsistent with several other remarks made by Judge Blythin. Thus, in denying renewed motions for change of venue or

continuance, he stated that it would be in Dr. Sheppard's interest to have a verdict rendered upon the evidence offered in court, "and the court has no idea whatever what that evidence will be. He hasn't even a thought as to the direction of it. He is fortunate in that respect, and he is very pleased about this situation." Again, in cautioning the jurors before a weekend recess to avoid all publicity about the case, he said that by avoiding such publicity "you will feel very much better as the trial proceeds, I am sure, and I have no idea what is going to develop in the trial any more than you do. . . . It is serious business, of course . . . we ought to be equally serious as the matter itself, and we should be sure that we are keeping ourselves as good citizens in the position where we can listen to that testimony without being influenced in any way, shape or manner by what may be surrounding in the air and which may have no basis in fact."

During the course of the trial, Judge Blythin cut off repetitious examination by defense counsel, and during the course of the ensuing discussion stated that "the Court thinks and believes, thoroughly believes, that he has been impartial from the beginning, and he will be to the end. The Court has no interest in this case other than to be sure that we do have a fair trial, and that we proceed with the trial." While overruling defense motions made at the close of the state's case, he made the following remarks:

> "Gentlemen, due to the tendency that always exists, among the laymen at least, to deem anything that the Court says about the evidence in a case, or about the remarks of counsel directed to that evidence, as some expression or at least suggestion that the Court has formed some opinion as to what the facts really are, of course, this case and in this connection at the moment the Court has no obligation whatever, nor even right, to even consider the weight of the facts

> in this case nor to express any opinion or, in fact, have any opinion as to the guilt or innocence of the defendant."

Perhaps most important, an affidavit by one of the original defense counsel filed in the present proceeding relates that when Judge Blythin was asked whether he would be influenced by the fact that his son had participated in investigating the crime, he stated that he would disqualify himself if defense counsel wished, and "he made himself very clear as to what his position was, and that he could sit and hear this case without having any prejudices." We find further evidence of his judicial discernment in Judge Blythin's valid defense of his court and himself in denying petitioner's motion for new trial,

> "It is to be noted that not a single person or agency connected with the investigation of, or prosecution for, the crime involved escapes the anathema of the defense. These include the police, the coroner, his assistants, the prosecuting attorney and his aides, the State's witnesses, the grand jury, its foreman, the trial jury, the public, the bailiffs *and the Court*. The sense of search for truth and the declaration of justice seem to have vanished from a whole community as if by magic and overnight. The news agencies of every kind and character are thrown in for good measure. *In spite of all the charges made not a single specific item is cited in support of the claims made.* Only broad generalities are indulged in. Reviewing courts will, we hope, have the duty of passing on all the legal questions involved and appearing on the record, and unless it is shown in very clear fashion that some extrinsic forces plowed through the effort to grant the defendant a fair trial, and succeeded in disrupting that effort, it is fair to assume that none did." (Emphasis supplied.)

The accuracy of the quoted statements by Judge Blythin, permanently recorded when made, are not subject to fallible human memory as are the dead-man "admissions" furnished by Murray and Mrs. Dorothy Kilgallen Kollmar. Certainly a factfinder could give them weight in resolving the issue.

Despite the foregoing, however, we do not feel that we need here rule that the District Judge's finding of fact was clearly erroneous within Fed. R. Civ. P. 52(a). Accepting his finding that Judge Blythin in fact made the statements attributed to him, we are not persuaded that petitioner has met his burden of proving deprivation of his constitutional rights in this regard. Absent some proof that an early impression of petitioner's guilt so infected Judge Blythin's judicial disposition as to impair his ability to provide petitioner a fair trial, we cannot join in the holding of the District Court. We find no authoritative disagreement with the text that "a judge is not disqualified to sit in a criminal case merely because he has an opinion as to the guilt of the accused, or is convinced of his guilt. . . ." 30A Am. Jur. *Judges*, § 172, p. 89, and that "In the absence of prejudice or bias, a judge is not disqualified by a declaration of his belief as to the guilt of a person charged with an offense before him. . . ." 48 C.J.S. *Judges*, § 89, p. 1078. Compare Hendrix v. Hand, 312 F(2) 147 (CA 10, 1962); *United States* v. *Shotwell Mfg. Co.*, 287 F(2) 667, 672 (CA 7, 1961), *aff'd*, 371 U.S. 341 (1963); *United States* v. *Mroz*, 136 F(2) 221, 224 n.4 (CA 7, 1943), *cert. dismissed*, 320 U.S. 805, 88 L. Ed. 487 (1943).

The only authorities cited by the District Judge for his finding of constitutional error in the failure of the trial judge to recuse himself, *State, ex rel. Pratt* v. *Weygrandt, Chief Justice*, 164 Ohio St. 463, 132 NE(2) 191 (1956); *Tumey* v. *Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927); *In re Murchison*, 349 U.S. 133, 99 L. Ed. 942

(1955), are completely inapposite. In the case at bar it was the jury and not the judge who determined the guilt or innocence of petitioner. *Pratt* v. *Weygandt* was a divorce case to be decided entirely by the trial judge, and mandamus to compel his replacement was refused. *McFadden* v. *United States,* 63 F(2) 111 (CA 7, 1933), not cited by the court below, is also distinguishable as involving a trial to the judge without a jury. Similarly, in *Tumey* v. *Ohio,* the United States Supreme Court held improper state provisions for trial of liquor law violations before a village mayor who was to retain the amount of his costs in each case of conviction, in addition to his salary. The Court said, "But no fees or costs in such cases are paid him except *by the defendant if convicted.* There is, therefore, no way by which the mayor may be paid for his service as judge, *if he does not convict* those who are brought before him. . . ." 273 U.S. 520, 71 L. Ed. 753. (Emphasis supplied.) The Court also noted that "all questions of judicial qualification may not involve constitutional validity. Thus matters of . . . personal bias . . . seem generally to be matters merely of legislative discretion." 273 U.S. 523, 71 L. Ed. 754. *In re Murchison* involved the Michigan "one-man grand jury" statute and the Supreme Court held that due process was denied where the judge presiding at a contempt hearing had also served as the "one-man grand jury" out of whose proceedings the contempt charges arose. The distinction between these cases and the case at bar is obvious.

It would come as no surprise to the legal profession and to an informed judiciary that there must be many times when a presiding judge exhibits impeccable fairness and discretion in his conduct of a criminal jury trial notwithstanding his own belief in the guilt of a defendant. What, for instance, of the position of the judge where a defendant withdraws a guilty plea? See *United States* v. *Kravitz,* 303

F(2) 700 (CA 3, 1962), *cert. denied*, 371 U.S. 922 (1962). Such fairness, indeed, is the mark of the kind of men we dare to think occupy judicial office. If no judge could preside at a criminal trial except one devoid of discernment, we would be hard put to find judges to handle our criminal dockets. We pridefully believe that by and large our judges are so conscious of their solemn duties as to protect meticulously the rights of an accused notwithstanding personal impressions of his guilt or innocence. Good judicial manners should of course suggest nondisclosure of such thoughts, but on the record before us we are unable to join in finding impropriety of constitutional magnitude. Certainly we cannot accept the District Judge's determination that such statements raise a presumption of constitutional unfairness and that having made such statements "the judge then has a personal interest in seeing that the defendant is convicted or the judge may well be embarrassed for having made such an emphatic statement of guilt." 231 F. Supp. 65-66. Upon what weak foundations would rest the judgments of our courts if long after the event they could be set aside by attributing to a judge misconduct not discoverable in the trial record, in circumstances where death forecloses any answer by the accused judge.

Much has been made of the fact that the Sheppard trial began on the eve of a judicial election at which the trial judge and one of the prosecution staff were candidates. We must assume that this emphasized to imply that desire for victory may have led the judge to conduct prejudicial to Dr. Sheppard's rights. We would have to entertain a low estimate of the integrity of our fellow judicial officers to join in any such inference. In most of the states of the Union it is traditional that those who occupy judicial office be required from time to time to account for their stewardship by submitting to election. If it is suggested that we presume that an elective judiciary can preserve

constitutional rights only at some undefined distance in time from election day, we reject such suggestion out of hand. As realists we know that those who seek reelection to judicial office hope that their conduct will find public approval, but we do not think that judicial *misconduct* would be more attractive to the electorate than conduct marked by the integrity which was as judges like to believe is possessed by elected judges as well as those who have the security of tenure during "good behavior." Nor are we prepared to presume that any judge is so far enamored of his position as to betray its responsibilities, no matter what he thinks would most please the electorate.[11] Additionally, it is not inappropriate to note that much of the publicity complained of, and the actual taking of testimony at Dr. Sheppard's trial, occurred *after* the election had been held. For like reasons, we must reject Dr. Sheppard's

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[11] The dissenting opinion refers to what is termed a "TV camera interview" of Judge Blythin with a former Scotland Yard officer and a "television program conducted on the steps of the courthouse, where . . . the trial judge had appeared." The basis for these charges is an unposed news photograph showing Judge Blythin approaching the door to the courthouse. The newspaper identification of the picture recited that the interview was being conducted "as Judge Edward Blythin breezed by." In denying the motion for new trial, Judge Blythin gave this account of the event:

"The court, on one morning, walked toward the courthouse steps, as usual, and there saw Robert Fabian (a retired Superintendent of Scotland Yard) with a very small contraption in his hand. Mr. Fabian said, 'Good morning, Judge Blythin, nice morning.' The court said 'Good morning, Mr. Fabian.' These are the very words, as near as the court can remember them, that passed. There was no conversation of any kind about the case on trial or any other subject."

The dissent also refers to a news photograph which is characterized as showing Judge Blythin "holding a press conference" during the jury's deliberations. However, this event is identified by the Cleveland Plain Dealer as follows: "Cornered by reporters, Common Pleas Judge Edward Blythin announced he was going to let the Sheppard murder jury continue to deliberate despite the record-breaking period it had been out."

We are unable to convict Judge Blythin of witting or unwitting misconduct from these events.

repetition in this Court of his broadside charge "that the elective judges of Ohio were so biased and prejudiced against him that he could not expect fair adjudication of his case in state courts. . . ."

3) *Lie detector evidence.*

Bay Village Mayor Houk, witness for the state, buttressed his veracity, over defense objection, by disclosing that he had submitted to a lie detector test. He was not allowed to give the results of the test. This was found not to have been reversible error by the Ohio appellate courts. *State* v. *Sheppard*, supra, 100 Ohio App. 345, 388, *aff'd*. *State* v. *Sheppard*, 165 Ohio St. 293. We are satisfied that no due process question is presented by this subject. Details of the Houk testimony are set forth in the District Court opinion wherein the District Judge indicates that, standing alone, the Houk affair might not be of constitutional stature.

In the pretrial press accounts, reference was frequently made to Dr. Sheppard's refusal to take a lie detector test. These same accounts also reported that he initially explained that his unwillingness to submit to the test arose from his then overwrought emotional state. He later assigned his continued refusal to the advice of his counsel and his family. Upon trial, two police officers gave evidence of his refusal to take the test. No objection was made to the testimony of the first officer, and the lie detector question was discussed thoroughly on direct, cross, redirect, and recross examination. Nor was there any objection when the second officer first referred to Dr. Sheppard's refusal to submit to such testing. The context of the first objection made—and the charge of constitutional error by the trial judge—is found in the following continuation of the second officer's account of Dr. Sheppard's voluntary communications to the police, which were made in the presence

of his counsel. We have partially reduced this excerpt to narrative form.

> When that tour was completed . . . we had some conversation with Dr. Sam and Mr. Petersilge and Mr. Corrigan. . . . I asked him if he could come into the office and make a statement in writing telling us the facts about the night of July 3rd. And it was agreed that I was to be called on the telephone nine o'clock Saturday morning, July 10th. Mr. Corrigan said he would call me about 9 a.m. . . . At about 8:20 or 8:25 A.M., July 10th Dr. Stephen Sheppard, Dr. Samuel Sheppard and Mr. Petersilge came into our office. He said he was prepared to make a statement. Then after being interviewed for an hour and a half, he was taken into our office on the fourth floor where he made a statement, which was typed. That statement has been offered into the evidence. State's Exhibit No. 48 is the statement that the defendant made at our office on the 10th. After the defendant made this statement in writing, the next time that I saw him was on July 12th. I saw him at his home, and spoke with him. Mr. Corrigan, Mr. Petersilge [Sheppard's counsel] his brother, Dr. Richard and Dr. Stephen were present. I again asked him if he had thought over the suggestion that I made that he try to eliminate himself as a suspect. He stated that he wanted to help us in every way possible to serve this crime—solve this crime. I asked him "Why don't you meet me some morning at some designated place at a designated time unbeknownst to anyone but yourself and myself and we will take this lie detector test, and at least you will eliminate yourself in one way?"
>
> "Q. Now, did you state to him as to where this test would be made?

"A. I said anywhere, regardless of where it might be, I would take him wherever he wanted to go.

"Q. And what did he say to that?

"Mr. Petersilge: Objection, your Honor. Now, the prosecutor keeps asking about whether Dr. Sheppard was willing to take a lie test, a lie detector test, and the Court of Appeals of this county has held that the results of a lie detector test are not admissible in evidence. It follows from that that it makes no difference whether Dr. Sheppard said that he would take the test or whether he refused to take the test.

"The Court: Well, he has answered the question. The Court will instruct the jury on the matter.

"Mr. Petersilge: Exception.

"Q. What did he say?

"A. He says, 'No,' he says, 'I'll be guided by the advice of my family and my attorneys.'

"The Court: Mr. Parrino, the Court would like to say a word to the jury now. Ladies and gentlemen of the jury, you are not to understand by these questions that any person is obligated to take any lie detector test. A person has his own choice. He is under no obligation whatever to take it. All right.

* * * * *

"Mr. Petersilge: Just a moment. If the Court please, we request the Court also to advise the jury that he not only has an option whether he will take it or not, but that the results of that test are not admissible in evidence.

"The Court: Well, they are not here, anyway, Mr. Petersilge.

"Mr. Mahon: We haven't any results here.

"The Court: They are not here.

"Mr. Mahon: We are not offering any results.

"Mr. Petersilge: That's right, but the reason should also be stated to the jury.

"The Court: I know, but we need not go beyond what we have in evidence. The evidence is here that he was asked to take it, he refused. Now, the Court tells the jury that he doesn't have to take it, period. We will stop right there.

"Q. Was there any further conversation there on the 12th?

"A. I said, 'Will you give me an answer on that in the very near future?' He says, 'I'll act only upon the advice of my family and my attorneys.' "

The statement, Exhibit 48, was Sheppard's voluntary exculpatory statement and his answers to the officer's suggestion of a lie detector test were given voluntarily in the presence of his attorneys. Despite the above objection, Dr. Sheppard when testifying in his own behalf on direct examination by his counsel, told about the first request that he submit to a lie detector test and stated that he told the officers he would be willing to submit to such examination "if it was a reliable test." The subject was alluded to by the prosecution and the defense in the closing arguments, again without objection.

Neither the District Judge nor counsel point to any decisions ruling unconstitutional the admission of testimony that a criminal defendant has refused to submit to a lie detector test. Authority for any such ruling must, we believe, be found in radiations from the Fifth Amendment, newly made applicable to state court proceedings by the decision in *Malloy* v. *Hogan*, 378 U.S. 1 (1964). *Cf. United States ex rel. Shott* v. *Tehan*, 337 F(2) 990 (CA 6, 1964); *Schiers* v. *California*, 333 F(2) 173, 176-77 (CA 9, 1964); *Helton* v. *United States*, 221 F(2) 338, 341 (CA 5, 1955); *Mezzatesta* v. *Anderson*, 227 F. Supp. 267, 271 (D. Del. 1964). For this reason, we believe it appropriate to note

also that defense counsel questioned Dr. Sheppard on his failure to invoke the privilege against self-incrimination at the coroner's inquest, and mentioned this failure in both opening and closing arguments to the jury.

The conduct of defense counsel regarding lie detector testimony has been discussed at length because we believe it spares us the need of determining the precise constitutional question suggested by the opinion of the District Court. Whatever the rule may be when prompt and appropriate objection is made, it is not a denial of due process for a trial court to withhold supervision of a seemingly deliberate withholding of objections by defense counsel or to allow a tardy change of strategy. It is significant that no motion to strike the extensive pre-objection testimony on this subject was ever made, that no written instruction on the subject was proffered at any time, and that no error was assigned on appeal because of what occurred in this regard. We think it would be a quite justifiable inference that for reasons sufficient to themselves, Dr. Sheppard's able and experienced trial counsel deliberately made an initial decision not to object to this evidence. We need not at this time try to probe the minds of such counsel to speculate as to what prompted their trial strategy. The passage quoted above demonstrates that they were aware of the rule rendering the results of lie detector tests inadmissible, and in their earlier objections to Mayor Houk's testimony they showed their awareness of the normal rule against testimony as to whether such a test has been taken. Ohio follows these rules. *State* v. *Smith*, 113 Ohio App. 461, 178 NE(2) 605 (1960). Sophisticated trial counsel will readily recall many occasions when they have deliberately withheld objection to inadmissible evidence and thereby served their client well. Varying reasons motivate such strategy. In this case, counsel may well have desired to obtain from the mouths of police officers the many exculpa-

tory statements made by Dr. Sheppard during the course of the investigation, particularly his original willingness to be tested by a lie detector, and to that end exhibited an attitude of willingness to let the officers talk. Their decision at long last to object to a particular answer which they then thought damaging to their theory that police hostility prompted the refusal did not shut out what had already been said on the subject. We agree that the trial judge could and should have given a better instruction to the jury, telling them that the results of a lie detector test would not be admissible and, *even though not requested to do so,* might well have gone further to say that no inference should be drawn from an accused's refusal to submit to such a test. His advice to the jury that they were "not to understand by these questions that any person is obligated to take any lie detector test. A person has his own choice. He is under no obligation whatever to take it," was, indeed, less than perfect. However, except for the on-the-spot request to tell the jury that "the results [of] that test are not admissible," no other instruction was requested, and the court did emphasize that no results of any test were available. We cannot find that the handling of this matter deprived the petitioner of any federally granted constitutional rights. If there was fault in what occurred, it was a nonconstitutional error which should have been assigned on appeal. Habeas corpus is not to be employed as a substitute for appeal. *E.g., Oyler* v. *Taylor,* 338 F(2) 260, 262 & n.3 (CA 10, 1964); *Allen* v. *Bannan,* 332 F(2) 399, 402 (CA 6, 1964); *Barker* v. *Ohio,* 328 F(2) 582, 584-85 (CA 6, 1964); *Worth* v. *Michigan,* 291 F(2) 621, 622 (CA 6, 1961), *cert. denied,* 368 U.S. 862 (1961); *Anderson* v. *Jones,* 281 F(2) 684, 686 (CA 6, 1960).

We think that the observations of the Seventh Circuit in *United States ex rel. Townsend* v. *Ogilvie,* 334 F(2) 837, 843-44 (1964) are pertinent here.

> "The [federal] court does not possess a residuum of power to search the record for procedural errors not involving constitutional rights and issue a writ of habeas corpus for the purpose of providing a new trial in the state court.
>
> "A federal court acting in this fashion would constitute a super appellate tribunal and encroach upon state appellate court prerogatives; such action would affront the principles of federalism upon which our federal-state juridic system operates."

At this distance, we cannot say that the decision of Dr. Sheppard's veteran counsel to withhold objection to the lie detector evidence prejudiced their client. It goes without saying that Dr. Sheppard's conviction does not prove such.

As proud as we are of the great traditions of our courts and their concern for the rights of those accused of crime, we are aware that like all human institutions they seldom act with perfection. It is not difficult, after ten years of searching analysis and contemplative study and the announcement of some new judicial attitudes, to find some imperfections in the conduct of a trial and to conclude that a judge or any attorney could have done a better job. But stability of the law and a nation's respect for its courts will disappear if, long after the event, their judgment may be set aside because a trial judge's discretion was less than perfectly exercised or because it is thought that the trial plan of defense counsel was not the best that could have been employed. This must be especially true where an accused has enjoyed adequate and full opportunity for appellate review.

4) *Misconduct of bailiffs in allowing Jurors to call their families.*

Ohio has a statute which provides for keeping a jury together from the time the cause is finally submitted until they agree upon a verdict. Overnight separation is permitted during adjournments of their deliberation. Ohio Revised Code § 2945.33 further provides that the officer in charge of the jury "shall not permit a communication to be made to them." As noted above, the Sheppard jury was not sequestered until the case was finally submitted. At that time, an entire floor of a hotel was set aside for occupancy by the jurors and the officers in charge of them. The telephones in each of the rooms occupied by the jurors were disconnected, but telephones in the officers' rooms remained in service. The stipulation of facts in the habeas corpus proceeding recites that during the days of their sequestration, but obviously not while they were actually engaged in their deliberations, various members of the jury were permitted to use the telephones in the bailiffs' rooms.

> "The calls were placed by the jurors. No records were kept as to the numbers called, the parties called, talked with, or the calling jurors. The bailiffs sat next to the phone as the conversations took place, but could only hear that half of the conversation made by the juror; what was said *to* the jurors could not be heard by the bailiffs. The Court was never asked for permission to allow the jurors to make these calls, and no permission was ever given."

While the District Court's opinion recites the foregoing stipulation, there was also before it the entire record of the Common Pleas Court, including the hearing on petitioner's motion for new trial and the investigation then made of the telephone calls. Not mentioned by the District Judge or by the dissenting opinion is the testimony of

bailiff Francis taken at the hearing on the motion for new trial, as follows:

"Q. Do you know, of your own knowledge, whether there was any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?

"A. Their phones were cut out, Mr. Garmone.

"Q. And were there any telephone calls made from the room that you occupied?

"A. Yes, sir.

"Q. Did you make the calls, or did the jury make the calls?

"A. No. The jury made the calls, and I sat in the chair right alongside the telephone.

"Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * * * *

"A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

"Q. Was there any conversation whatsoever about this case or their deliberations?

"A. Not one word, Mr. Parrino."

The calls of the jurors were made the subject of an assignment of error on appeal, but the Supreme Court of Ohio refused to find cause for reversal in what happened. *State* v. *Sheppard,* 165 Ohio St. 293, 289-99. Upon this subject the court said:

"In situations such as those in the *Adams* and *Emmert cases,* it is easy to presume prejudice to the defendant as a result of the conduct of the bailiff. Can the same be said of the conduct of the bailiffs here in permitting jurors, who for several days and nights had been sequestered and unable to see or hear from their husbands, wives or children, to telephone those members

of their families? We do not think so. There is, on the contrary, every reason to believe that assurances of the health and welfare of their loved ones would tend to ease the jurors' minds as to personal matters and would make them better, more conscientious jurors. Time after time, the members of this jury were instructed by the court not to communicate with anyone concerning this case or permit anyone to communicate with them about it. We must assume they followed the court's instructions. No complaint is made that they disregarded these instructions every night for some seven weeks that they were allowed to go home at the close of each day's session of the trial. It is difficult to visualize a juror who will follow a court's instruction during the many hours he spends each evening and week end with his family and then deliberately disregard that instruction in a few brief moments he speaks to a member of his family on the telephone in the presence of a bailiff.

"The law of Ohio is that no judgment of conviction shall be reversed in any court for any cause unless it appears affirmatively from the record that the defendant was prejudiced thereby or was prevented from having a fair trial. Section 2945.83, Revised Code. There is no such affirmative showing of prejudice here, and this court will not presume a prejudice as a matter of law from the fact that some of the jurors made telephone calls to members of their immediate families."

The foregoing is not only the law of Ohio on this question but, in our view, is just plain common sense. Here again the District Judge placed reliance on cases the facts of which disclose their lack of resemblance to the case before him and us. *State* v. *Adams*, 141 Ohio St. 423, 48 NE (2)

861, 146 ALR 509 (1943); *Emmert* v. *State,* 127 Ohio St. 235, 187 NE 862, 90 ALR 242 (1933); and *Mattox* v. *United States,* 146 U.S. 140, 36 L. Ed. 917 (1892). In *State* v. *Adams,* a bailiff who had been told by the jury that it could not agree said to them, "you can't do that. You must reach a decision if you have to stay here for three months." In *Emmert* v. *State,* the officer in charge of the jury remarked to certain jurors, "My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad." Aside from this obvious inappositeness, these Ohio cases were found not controlling of this case by the Ohio Court. *Mattox* v. *United States* involved direct review of a federal trial. Because the dissenting opinion frequently cites *Mattox* to support its conclusions, we have set out in the margin Chief Justice Fuller's recital of the facts in *Mattox*[12] because it discloses a situation totally different from the facts of the

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[12] "In support of his motion for new trial the defendant offered the affidavits of two of the jurors that the bailiff who had charge of the jury in the case after the cause had been heard and submitted, 'and while they were deliberating of their verdict,' 'in the presence and hearing of the jurors or a part of them, speaking of the case, said: "After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him." And at another time, in the presence and hearing of said jury or a part of them, referring to the defendant, Clyde Mattox, said: "This is the third fellow he has killed."' The affidavit of another juror to the same effect in respect of the remark of the bailiff as to Thompson was also offered, and in addition, the affidavits of eight of the jurors, including the three just mentioned, 'that after said cause had been submitted to the jury, and while the jury were deliberating of their verdict and before they had agreed upon a verdict in the case, a certain newspaper printed and published in the city of Wichita, Kansas, known as The Wichita Daily Eagle, of the date of Thursday morning, October 8, 1891, was introduced into the jury room; that said paper contained a comment upon the case under consideration by said jury, and that said comment upon said case so under consideration by said jury, was read to the jury in their presence and hearing; that the comment so read to said jury is found upon the fifth page of said paper, and in the third column of said page, and is as follows:

present case. There the trial court refused to consider specific affidavits by jurors establishing highly prejudicial communications. Here defense counsel actually questioned three of the jurors on their motion for new trial, but no attempt was made to discover anything about the telephone calls, and no attempt was made to call the other jurors for such examination. Neglect of this opportunity to prove actual prejudice might itself be reason enough to deny relief in the absence of any present showing of actual prejudice, compare *United States* v. *Gersh,* 328 F(2) 460 (CA 2, 1964), *cert. denied sub nom. Mugnola* v. *United*

"'"*The Mattox case — The jury retired at noon yesterday and is still out.*

"'"The destiny of Cyde Mattox is now is [sic] the hands of the twelve citizens of Kansas composing the jury in this case. If he is not found guilty of murder he will be a lucky man, for the evidence against him was very strong, or at least appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict. The hour passed and nine more of them with it, and still a verdict was not reached by 10:30 last night, when the jury adjourned and went to their rooms at the Carey. Col. Johnson, of Oklahoma City, defended him, and made an excellent speech in his behalf to the jury. Mr. Ady also made a fine speech and one that was full of argument and replete with the details of the crime committed as gathered from the statements of witnesses. The lawyers who were present and the court officers also agree that it was one of the best and most logical speeches Mr. Ady ever made in this court. It was so strong that the friends of Mattox gave up all hope of any result but conviction. Judge Riner's instructions to the jury were very clear and impartial, and required nearly half an hour for him to read them. When the jury filed out, Mattox seemed to be the most unconcerned man in the room. His mother was very pale and her face indicated that she had but very little hope. She is certainly deserving of a good deal of credit for she has stuck by her son, as only a mother can, through all his trials and difficulties, and this is not the first one by any means, for Clyde has been tried for his life once before. He is a youthful looking man of light build, a beardless face, and a nervous disposition. The crime for which he has just been tried is the killing of a colored man in Oklahoma City over two years ago. Nobody saw him do the killing and the evidence against him is purely circumstantial, but very strong, it is claimed, by those who heard all the testimony."'" 146 U.S. 142-144, 36 L. Ed. 918-19.

States, 377 U.S. 992 (1964). Going beyond this possibility, it is worthy of note that even on direct review of federal convictions where improper communications have been had with a juror, "it is well settled that what is prejudicial to a fair trial when the issue of 'juror misconduct' is raised, is a matter that must, to a large extent, be left to the discretion of a trial court and that an appellate court will not reverse the determination of that court on such an issue unless it is established as clearly erroneous." *Little* v. *United States,* 331 F(2) 287, 295 (CA 8, 1964), *cert. denied,* 379 U.S. 834 (1964). Several other cases establish that communications with jurors, even during their deliberations, do not necessarily void their verdict, *E.g., United States* v. *Kahaner,* 317 F(2) 459, 482-83 (CA 2, 1963), *cert. denied,* 375 U.S. 835, 836 (1963); *Steiner* v. *United States,* 229 F(2) 745, 748-49 (CA 9, 1956), *cert. denied,* 351 U.S. 953, 100 L. Ed. 1476 (1956); *Ryan* v. *United States,* 191 F(2) 779 (CA D.C. 1951), *cert. denied,* 342 U.S. 928, 96 L. Ed. 691 (1952); *Cavness* v. *United States,* 187 F(2) 719, 723 (CA 9, 1951), *cert. denied,* 341 U.S. 951, 95 L. Ed. 1374 (1951). The showing that communications were had with the jurors, accordingly, is not of itself enough to demonstrate a denial of due process. So in *Near* v. *Cunningham,* 313 F(2) 929, 933 (CA 4, 1963), the court ruled that "should it appear that prejudicial statements were made in the presence or hearing of the jurors," the habeas corpus court must reach its constitutional decision "in the light of all of the surrounding circumstances." Here there is no pretense at showing that prejudicial statements were made to the jurors by their children or spouses. The presumption that the jurors remained true to their instructions is fortified by petitioner's neglect of his opportunity to show that the jurors chose this particular opportunity among many to violate their instructions. In view of the absence of any

attempt to demonstrate or even claim such violations here we are satisfied that the Ohio Supreme Court correctly disposed of this issue, and that in any event the occurrence does not present a denial of constitutional due process.

The Supreme Court's recent decision in *Turner* v. *Louisiana*, 379 U.S. 466 (1965) does not affect decision of this question. The Court was there dealing with a conviction following three days' "continuous and intimate association" between the jury and two keys witnesses for the prosecuton, who were also deputy sheriffs. Dispensing with the requirement that *improper* communications be shown in such a situation cannot be related to the present situation, where we are shown only that some members of the jury made brief telephone calls to members of their families with whom they had, quite properly, been in continuous association throughout the trial.

5) *Other questions.*

Each of the "errors" discussed above was found by the District Judge to constitute a deprivation of due process, but he concluded his opinion with the observation that when taken together they reduced the trial to a "mockery of justice." Without further discussion, we are unable to attribute to a combination of these several claims a constitutional potency they lack individually. We have rejected the claims based on publicity, alleged bias of the trial judge, and communications with the jurors because no showing has been made that anything improper in fact occurred; we are no more willing to presume infirmity when these claims and the matter of the lie detector evidence are listed together than when they are considered separately.

Petitioner's brief to this court suggests that if we find the reasons given by the District Judge insufficient for granting the writ "such action would require a remand for further factual determination of the remaining points."

Counsel urges, in the alternative, that we pass upon these remaining points not relied on by the District Judge, and as to them petitioner "will stand upon the argument addressed to them in the Brief for Petitioner in the District Court." Without passing upon the procedural propriety of these suggestions, we consider that the case made in the District Court is before us and we have considered and found without merit the other claims of constitutional vice in the judgment convicting Dr. Sheppard.

One further subject should be briefly mentioned. Dr. Sheppard's petition claimed that the evidence at his trial was constitutionally insufficient to justify submitting the issue of guilt or innocence to the jury. This claim was neither withdrawn nor sustained upon the hearing in the District Court. On this subject, the petitioner's brief states,

> "The District Judge expressly declined to consider this issue . . . , although in all fairness it should be stated that counsel for petitioner-appellee on several occasions offered to waive this claim of error. . . . No waiver was required, however, *and the issue remains.* This Court no doubt has the power, since the trial transcript is before it as an exhibit from the District Court, to search the record and conclude that the allegation of insufficiency is well-taken." (Emphasis supplied.)

We construe this as a suggestion that we pass upon this point only if we find in his favor. Counsel continues as follows:

> "Appellee neither asks nor urges such relief, for he is ready, willing and anxious to stand retrial in any community not infected with an envenomed atmosphere, and a favorable ruling upon this issue would cause jeopardy to attach to the 1954 trial. This is not, however, to be taken as any concession that there was suf-

ficient evidence to constitutionally support a judgment of conviction in the first instance, for we vigorously contend that there was not. We simply do not press it at this time."

The Court of Appeals decision, affirmed by the Ohio Supreme Court, fully discussed the evidence and found it sufficient for submitting the issue of guilt to the jury. 100 Ohio App. 345. No claim is made here that that court's detailed recital of the evidence adduced at the trial is substantially erroneous. Without attempting to assess petitioner's actual guilt or innocence, this recital clearly establishes that Dr. Sheppard's conviction is not "so totally devoid of evidentiary support" as to constitute a denial of due process. *Garner* v. *Louisiana,* 368 U.S. 157, 163 (1961); *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *Hall* v. *Crouse,* 339 F(2) 316 (CA 10, 1964).

Petitioner apparently desires to save something for a further entry into or a rehearing in the District Court. We think that Ohio's appeal has brought the entire habeas corpus proceeding to us. We have passed upon it and do not find any basis for the release of Dr. Sheppard or the granting of a new trial.

Conclusion.

There is today no uncertainty that it is proper and, indeed, obligatory that Federal Courts see to it that no state shall convict or imprison anyone without that due process of law which the United States Constitution demands. This duty must be discharged, even at the risk of appearing arrogant in setting aside a judgment approved by all the courts of a particular state. In the context of the case before us, however, we will not be considered delinquent if we give proper respect to the carefully considered decisions of the Ohio courts and attribute to those courts power to discern and protect the constitutional rights of an accused at least approaching our own. Cer-

tainly the District Judge who heard this case gave to its study the labor, the conscientiousness, and the commendable concern for the accused's constitutional rights which we like to think are typical of our Federal judiciary. We fear, however, that this admirable zeal led him to go beyond permissible limits to find constitutional fault in what was done by the Ohio courts. The facts of this case do not add up to any of the situations in which the Supreme Court of the United States or any United States Court of Appeals has found it appropriate to strike down a judgment affirmed by the highest court of a state.

The order and judgment of the District Court is reversed with direction to discharge the writ and remand the petitioner to the custody of the respondent.

EDWARDS, Circuit Judge, dissenting. If ever flagrant and tolerated interference of news media in a criminal trial served to deprive a defendant of his constitutional rights to due process and a fair trial, this surely must be such a case.

The United States District Judge whose writ of habeas corpus we review declared this trial void and ordered the State of Ohio either to retry petitioner or set him free. By so doing, Judge Weinman did no more than fulfill his sworn obligation to uphold the Constitution of the United States. I would affirm.

The record which we review discloses a trial which fell far below minimum federal constitutional standards of due process.

The fundamental concept of a jury trial requires the protection of the jury from extra-judicial information about the case.[1] This doubtless can never be perfectly achieved in a trial of great public interest because of pretrial publicity.[2] But this fact serves as no excuse for fail-

[1] *Mattox* v. *United States*, 146 U.S. 140 (1892).
[2] *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961).

ure to employ all of the known and established measures for selection of an impartial jury and for the protection of that jury from outside influences during the trial itself.

This trial was held in a murder-shocked community in close proximity to the date of the crime in the midst of "unparalleled" publicity. (See *State* v. *Sheppard*, 165 Ohio St. 293, 294 (1956)) During the nine weeks of trial this jury was allowed to separate each night and weekend to their individual neighborhoods and homes. Such admonitions as the trial judge gave pertaining to news media during the first month of testimony were equivocal and inadequate.

During this trial there were constant extra-judicial contacts and communications with this jury. Many of these extra-judicial contacts and communications with the jury are clearly established by the record. As to others, Judge Weinman found that jury knowledge should be implied because of a factual record which impells me to the same conclusion.

A number of the most important and most prejudicial of the news media communications were drawn from sources completely outside of the trial record. These were not just news media inaccuracies or debatable comments in reporting court proceedings, they represented deliberate and highly prejudicial supplementation of the trial record.

Elaborate measures were provided for news media convenience in covering the trial. But the standard measures which could have been employed to prevent the news media from influencing the outcome of trial were not employed. In a trial atmosphere which the Supreme Court of Ohio described as "a Roman Holiday for the press," the news media were frequently allowed to become the dominant factor in a courtroom where defendant was on trial for his life. The judge who presided at this trial repeatedly professed his inability to control these events. In fairness it

should be noted that he was in the most difficult and vulnerable position possible to undertake to do so.

But at the outset it should be stated that it was not just abuse of freedom of the press which accounted for the violations of due process in this trial; it was failure of the judicial process also. This case provides no argument for repeal of the First Amendment or for immunization from prosecution of any person indicted for crime.

A judge assigned to try a controversial criminal case in the midst of great public excitement has the duty to guarantee due process of law. He also has the power to do so. Seven principal measures are available to him to protect the right to a fair trial of a person charged with crime.

1) On defendant's motion he can grant a change of venue to a distant locale in his same state which is less concerned with the crime. Ohio Rev. Code Ann. § 2311.38; *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); *Irvin* v. *Dowd, supra.*

2) He can adjourn the trial, at least briefly, until a peak of public excitement (or a judicial election!) has passed. Ohio Rev. Code Ann. § 2945.02; *Rizzo* v. *United States,* 304 F.2d 810 (C.A. 8, 1962), *cert. denied,* 371 U.S. 890 (1962).

3) He can lock up the jury during trial so that it is guarded from outside contact. Ohio Rev. Code Ann. § 2945.31; *United States* v. *Holovachka,* 314 F.2d 345 (C.A. 7, 1963), *cert. denied,* 374 U.S. 809 (1963); *Baker* v. *Hudspeth,* 129 F.2d 779, (C.A. 10, 1942), *cert. denied,* 317 U.S. 681 (1942); *Stone* v. *United States,* 113 F.2d 70 (C.A. 6, 1940).

4) Absent these precautions he has increased responsibilities in screening the jury from extra-judicial influences. See *Turner* v. *Louisiana,* 379 U.S. 466 (1965).

He has the duty to prohibit news media contact with

the jury. *Mattox* v. *United States, supra.* He has the power to exclude photographers from his courtroom. Canon 35, American Bar Association, CANONS OF JUDICIAL ETHICS.[3] He has the power to warn the news media that if communications prejudicial to either side in the trial and not derived from in-court testimony are widely disseminated, that this may cause a mistrial. See *United States* v. *Accardo*, 298 F.2d 133 (C.A. 7, 1962).

5) He has the duty to *order* the jury not to read or listen to any newspaper, radio or television material bearing on the trial. *Coppedge* v. *United States*, 272 F.2d 504 (C.A. D.C., 1959); *Schoeneman* v. *United States*, 317 F.2d 173 (C.A. D.C., 1963); *Carter* v. *United States*, 252 F.2d 608 (C.A. D.C., 1958).

6) He has the duty if it is called to his attention that highly prejudicial material is widely disseminated in the open community wherein a jury is living at home, to inquire as to whether the jury has actually heard or read it; and if so, to determine whether prejudice resulted; and if so, to grant a new trial. *Krogmann* v. *United States*, 225 F.2d 220 (C.A. 6, 1955); *Marson* v. *United States*, 203 F.2d 904 (C.A. 6, 1953).

7) He has the duty to be particularly alert to guard the

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[3] "35. *Improper Publicizing of Court Proceedings.**

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization." *Adopted September 30, 1937; amended September 15, 1952.

jury against any outside communication during its deliberations or verdict, and if unauthorized communications are shown, prejudice is presumed, and absent effective rebuttal of such prejudice, he has the duty to grant a new trial. *Mattox* v. *United States, supra*; *Little* v. *United States*, 73 F.2d 861 (C.A. 10, 1934); *Wheaton* v. *United States*, 133 F.2d 522 (C.A. 8, 1943). See also Ohio Rev. Code Ann. § 2945.33; *State* v. *Adams*, 141 Ohio St. 423 (1943).

In this case it must be recorded that the trial judge made no effective use of any of these measures.

BACKGROUND FACTS[4]

What follows are the stark and undisputed facts shown by this total record—omitting for the moment the legal arguments pertaining to how and whether each possible issue has been properly raised, and omitting also the five trial events upon which I would affirm issuance of this writ.

This was a capital case.

Defendant was charged with first degree murder for the killing of his wife.

Defendant and his wife were last seen in their home about midnight, July 3, 1954, after a normal social evening.

Defendant first reported the murder at 6 a.m., July 4, 1954, asserting that he had been awakened by his wife's screams and had fought with and been knocked out by "an intruder."

The wife had been brutally murdered by 35 blows with an unidentified weapon.

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[4] This summary is drawn from a) the stipulated statement of facts presented to the United States District Judge and printed herewith as Appendix A. b) The transcript of the original trial (12 volumes and 7,099 pages) which was stipulated as an exhibit before the District Judge. c) Five scrapbooks of newspaper clippings which were likewise stipulated to as an exhibit before the District Judge.

Defendant bore visible signs of physical injury and there was medical evidence as to injury to his neck and head.

Defendant's account of the events had a vagueness about important matters which he attributed to the injuries and from which the prosecution later inferred guilt.

Defendant clearly had the opportunity to murder his wife on the night in question. No other suspect of apparent significance appeared in the case.

But the normal evidence of murder—identification, confession, motive, and murder weapon—were completely lacking at the beginning of the investigation.

As a result of the paucity of obvious proofs, there was no immediate arrest.

A newspaper campaign for a solution to the crime began and was pushed with incessant vigor by Cleveland's three newspapers—but in particular by The Cleveland Press.

There was widespread publicity given to a police suggestion that defendant take a lie detector test and to his refusal to do so.

Although publicly there had been no apparent cloud on the domestic horizon of the Sheppard family prior to the murder, The Cleveland Press disclosed an extramarital romance which defendant had with a former laboratory technician at the hospital with which he was affiliated.

The Cleveland Press in front page headlines, editorial and cartoons berated official slowness, demanded an inquest, condemned the "protection" of "the chief suspect," demanded the entrance of the Cleveland Police Department into the investigation, and demanded the arrest and the "grilling" of defendant at police headquarters.

The inquest, the investigation by the Cleveland Police Homicide Unit, and defendant's arrest and "grilling" followed hard on the heels of these demands.

Later, a representative of The Cleveland Press made the public boast that The Cleveland Press' handling of the Sheppard story produced the trial.

Six weeks after the murder, on August 17, 1954, defendant was indicted for first degree murder by a Grand Jury after presentation of the results of the Cleveland Police Homicide Unit's investigation.

The trial began October 17, 1954.

The Ohio Supreme Court described the setting for the trial thus:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman Holiday' for the news media, Sam Sheppard stood trial for his life." *State* v. *Sheppard*, 165 Ohio St. 293,294 (1956).

The trial verdict came after nine weeks of trial and five full days of jury deliberation. The prosecution had asked for and insisted on a verdict of first degree murder. The defense had asked for and insisted upon a verdict of "not guilty." The jury returned a verdict of second degree murder.

THE TRIAL JUDGE AND THE PROSECUTOR

> "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."[5]

[5] Art. XXIX, Massachusetts Declaration of Rights (1780), 10 Anno. Laws of Massachusetts § 30, p. 32.

The trial judge's son was a detective who worked in the Homicide Unit of the Cleveland Police Department which secured defendant's indictment by the Grand Jury.[6]

As the trial opened on October 17, the trial judge was a candidate for re-election to the Common Pleas bench in an election scheduled for November 2, 1954.[6]

The assistant prosecuting attorney in charge of the state's case in defendant's trial was likewise a candidate for election to the Common Pleas Court of Ohio—Ohio's highest trial court.

The election occurred during the trial. Both the trial judge and the chief trial prosecutor were elected.

The trial judge and the trial prosecutor posed together for a newspaper picture congratulating each other on their mutual victories. The picture was printed in The Cleveland News on November 3, 1954. (See Appendix B).

As the trial resumed, defendant was being prosecuted by an elected judge, equal in all respects to the trial judge, except in the taking of the oath of office.

During the course of this trial, the trial judge's picture appeared in 46 issues of the Cleveland newspapers—including poses by him at the bench, reading a law book in chambers, in his shirt sleeves, pausing for a TV camera interview with Fabian of Scotland Yard on the steps of the courthouse (See Appendix C), and holding a press conference on the fourth day of jury deliberation on the verdict to announce his intention to keep them deliberating (See Appendix D).

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[6] Neither of these facts are relied upon by petitioner as constitutional violations. They plainly were known to petitioner's trial counsel. The first was discussed with the trial judge whose assurances of impartiality were accepted.

"The courtroom at these times is as sacrosanct as the cathedral, to be guarded against all raucous, impassioned, and foreign influence." [7]

News media interest in the case had increased as the trial date neared.

The names and addresses of all prospective jurors were published in the papers.

Extensive quotes from the *voir dire* examination of all prospective jurors were carried.

Every juror who ultimately was seated, except one, testified at *voir dire* to reading about the case in the Cleveland papers.

Every juror who was asked the specific question testified that a Cleveland newspaper was delivered daily to his or her home.

Seven of the twelve jurors who rendered the verdict were asked and did answer that they had one or more Cleveland papers delivered to their homes.

Five of the twelve jurors who rendered the verdict had The Cleveland Press delivered to their homes.

At the trial there were photographers inside the bar of Court immediately before the trial judge entered and immediately after the trial judge left the bench at any session where they desired to photograph the defendant, the jury, or the witnesses.

There was a table full of reporters and commentators within the bar of the court all through trial within one foot of the jury box.

All other seats in the courtroom, except those in the very last row, were assigned by the trial judge to news media representatives who were admitted on passes.

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[7] Justice William O. Douglas, *Public Trial and the Free Press*, 46 A.B.A.J. 840, 844 (Aug. 1960).

Half of the last row was assigned by the trial judge to the Sheppard family and half to Marilyn's family.

On the first day after it was sworn in, the jury was called back and posed in the jury box, with the pictures appearing in The Cleveland Press (See Appendix E).

On the same afternoon a reporter for The Cleveland Press was chosen as a representative of the press to accompany the jury on a tour of the Sheppard home.

On this same tour The Cleveland Press had a helicopter photographing the jury at the murder scene and subsequently published the photograph thus taken.

During the trial the jury's pictures, or those of one or more jurors, appeared in the newspapers 40 times (Cf. Appendix F).

These photographs included pictures of the jury, taken with the trial judge's permission, at lunch in the jury room (See Appendix G).

They also included repeated arranged photographs of the jury taken during the five days of their deliberations on the verdict. For one of such, see Appendix H.

There were also photographs taken during the trial in the home of the alternate juror (and printed in The Cleveland Press) picturing her husband, her mother, and her children (See Appendix I).

THE TRIAL RULINGS

> "The rules of courtroom conduct must be such as to remove it from the distractions and disturbances of the market place and to maintain as nearly as possible an atmosphere conducive to profound and undisturbed deliberation. . . . A court, in enforcing reasonable courtroom decorum, is preserving the constitutional and unalienable right of a litigant to a fair trial, and,

in preserving such right, the court does not interfere with the freedom of the press."[8]

As this trial opened the trial judge had ample warning from the pretrial events which we have recited as to the nature and aggressiveness of the publicity which might attend the trial.

The first matters before the Court on October 18, 1954, were defense motions for change of venue and continuance based on pretrial publicity and the trial arrangements for the news media. Defense counsel in reciting those arrangements pointed out "Even your Honor yourself, when you tried to mount the bench this morning, found your place occupied by a photographer taking pictures, and you had to remove him from the bench."

The following from one of the first day colloquies between Court and counsel vividly portrays the setting of this trial:

> "MR. CORRIGAN: If the Court please, I would like the record to show that inside the bar, as I stated before, is a table, and that that table extends over the width of the courtroom; that this courtroom is 26 by 48 feet; that the table runs east and west, and that the west end of the table is within six inches of the seat of the thirteenth juror and approximately two feet from the end of the jury box; that there has been assigned to that table representatives of the following news agencies:

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[8] *State* v. *Clifford*, 97 Ohio App. 1, 5-6 (1954), *aff'd.*, 162 Ohio St. 370 (1954), *cert. denied*, 349 U.S. 929 (1955). Ohio Appellate decision, April 14, 1954. Ohio Supreme Court decision, December 15, 1954. In these cases the Ohio Appellate Court upheld contempt convictions against three employees of The Cleveland Press for violating Judge Silbert's order against "picture taking while the court was in session."

Judge Silbert was a member of the same Common Pleas bench as the trial judge in the instant case.

"The Akron Beacon Journal; two seats for the International News Service; three seats for the Cleveland Press; three seats for the Cleveland News; three seats for the Cleveland Plain Dealer; two seats for the Associated Press; and a seat for the New York Journal American.

"That outside the rail or back of the rail in this courtroom, there are four rows of benches for spectators. That the first row of the spectators' benches have been assigned by the Court as follows, and are occupied by the following news services:

"Two seats to WGAR; two seats to WERE; one seat to WCUE; one to WTAM; two seats to WNBK; one seat to WDOK; one seat to WEWS; one seat to WHK; one to WXEL, all of these assignments being to representatives of broadcasting stations, radio stations or television stations, and one seat to the NEA, Newspaper Enterprise Association.

"That row two of the seats in the courtroom is assigned as follows:

"The Newark, New Jersey, News; the New York Post; the Pittsburgh Post Enterprise; two seats to the Cleveland News; two seats to the Cleveland Plain Dealer; two seats to the Cleveland Press, the Toledo Blade, the Pittsburgh Post-Gazette, the Lorain Journal, the Chicago Sun-Times, and the Scripps-Howard News Association.

"That the third row is assigned to WAKR; to the International News Service; the New York Journal American; Radio Station WSRS, Cleveland Heights; Detroit News; the New York News; two seats are assigned to Life Magazine; one to NBC and the St. Louis Post Dispatch.

"That the last—the only row of seats in the court-

room that is not assigned is the last row of the courtroom which accommodates about 14 people.

"We also wish to note in the record that there are in this courtroom three loud speakers and a microphone which stands in front of the witness chair.

"We incorporate all these things in the record before your Honor in the matter of our motion, both our motions, and we move at this time that the—I will change that.

"I state on information, on which I may be corrected if it is not so, that the seats that I have referred to were assigned by the Court, and that certain designations were put on the table and on the seats designatings the locations for these different organizations and newspapers that I have mentioned, and that that assignment was made by the Court on Wednesday of last week.

"Am I correct in that, your Honor?

"THE COURT: I beg pardon. I didn't get the last seat.

"MR. CORRIGAN: I say, I understand that these assignments whereby the courtroom is occupied as I have outlined was made by the Court on Wednesday of last week. Is that correct?

"THE COURT: Oh, no. That is not true. The Court will state as to what happened, also when you get through.

"MR. CORRIGAN: I noticed before we came to the courtroom that the three rows of seats back of the rail—there was posted on them a sign designating to whom they belonged, and that the signs designated these various radio stations and these various newspapers that I have mentioned, and that was done in advance of the trial. Is that correct?

"THE COURT: Yes, that's correct. The Court will state now for the record, also, that these arrangements that counsel has now referred to have all been had after a great deal of consideration, applications for space, but finally with the approval of the Court. There is no question about that at all. The arrangements as to the table for members of the local press in particular, and the national news services, were made sometime in the middle—perhaps Wednesday of last week, as counsel has indicated.

"Also, the next row, for the simple reason that those were set aside for local parties and the national news services, the second row in particular for the radio station representatives, and they selected the actual spaces within the—I mean the actual space for each individual within the total space, and they placed their tags on them so that each person will know where he sits.

"The others back of that were designated by the Court in the order of applications received for them.

"The back seat was kept for the members of the Sheppard family and the members of the late Mrs. Sheppard's family, and any other members of the public who will be admitted.

"The Court did that for the simple reason that the space is so very limited in the courtroom, and there is a request for space for far more people than can be accommodated at all.

"The Court will not during the progress of this trial permit any standees in the courtroom, and we are going to conduct this trial with that kind of decorum which befits a trial of any criminal case.

"As to the public address system within the courtroom, that was installed at the request of the Court because it is difficult to hear, particularly witnesses,

in the back of the courtroom, and it is very difficult at times for the jurors to hear witnesses. We are in a location where there is industry, light industry, it is true, a good deal of traffic, truck and other, and it is a place very difficult in which to hear at times.

"Let it be noted that this loud speaker—that these loud speakers are for the sole accommodation of the jurors, the members of the press and public in the rear of the courtroom, and especially for counsel at the trial table.

"There is no communication from inside the courtroom to any outside source, and all of these arrangements have been approved by the Court.

"Does that cover the——

"MR. CORRIGAN: Yes. If the Court please, I now move that the table be taken from inside the bar and removed from this courtroom; that the signs that have been placed on the three rows of spectators' benches be removed, and, as I understand, your Honor has issued cards, admission by cards.

"THE COURT: That's right.

"MR. CORRIGAN: And that the Court rescind the order whereby the only admission to this courtroom is by card issued by him. I so move.

"THE COURT: Overruled.

"MR. CORRIGAN: Exception.

"THE COURT: Now may we have the first juror?"

In addition to denying these motions the trial judge also denied a motion for continuance and took under advisement the motion for change of venue until an attempt to impanel a jury had been made.

On October 25 the trial judge denied defendant's motion for change of venue, holding that the jury impaneled demonstrated that a fair trial could be had in Cleveland.

On that same date the trial judge sent the jurors who

had been chosen to try this case home overnight—as he did for the subsequent weeks of this nine-week trial. (It should be pointed out that no motion to sequester the jury was ever made.)

On October 28, after impaneling twelve jurors, the trial judge finally denied the motion for change of venue.

On October 28 also, the trial judge gave the jury the basic "admonition" which he employed in this trial:

> "Ladies and gentlemen of the jury, now that you have been sworn as jurors for the trial of this case and you are about to leave this courtroom, the Court is going to do what the law of this state calls for and requires that he shall do. I have already stated to you what the law prescribes, and I will state it again in order that there be no misunderstanding whetever about it.
>
> "You are not to talk to anyone about this case or any matter in connection with it at any time during the progress of this trial. You are not to permit others to talk to you about it. You are not to remain anywhere where other people are talking about it among themselves, whether they have an interest in the case or not. You are not to discuss it among yourselves, either in your jury room or elsewhere.
>
> "It is the duty of a person who has been selected as a juror to sit here patiently and wait until all the evidence has been received and the instructions of the Court have been received and you are in your jury room for deliberation and decision before you discuss the matter in any manner, and in the meantime, you are individually to keep your own counsel and not to form any opinion or judgment whatever until the final step when you are in your jury room for deliberation and decision of this case.
>
> "Will you be good enough to observe that caution

during the progress of the trial? And I would suggest to you, as I have already done so—I don't know whether you were all here at that time or not—that you do not read the newspapers and you do not now listen to comments over the radio or by any other means until this case has been disposed of. Have somebody preserve those things for you until some future day when you will have lots of time to look them over.

"Now, without any formality at all, we will be adjourned until 9:15 tomorrow morning."

(It should be noted that the portion of the admonition which dealt with talking about the case, or allowing anyone to talk to them, was phrased in direct and commanding language. That portion of the admonition pertaining to news media employed the words "I would suggest to you."

Subsequent to October 28 a form of this "admonition" was given just four additional times up to the charge of the Court on December 17. On three of those occasions the word "suggest" was employed. Finally on December 3, the trial judge employed the somewhat more direct language, "Please do not read newspapers," etc.)

Thus by the 28th of October, basic judicial rulings on four of the major measures available to the trial judge to protect due process had been made.

On November 2, 1954, the trial was adjourned for election day. The trial judge was re-elected overwhelmingly.

On November 3 the jury as finally constituted was sworn in. The subsequent events of that day were recorded in the following colloquy on the morning of November 4:

"MR. CORRIGAN: If the Court please, I desire to renew my motion for a continuance of this case, for a change of venue, for the withdrawal of a juror and for a mistrial.

"(To the reporter): Would you read what I dictated yesterday?

"(Thereupon the following was read by the reporter, being taken at 11:00 o'clock a.m., Wednesday, November 3, 1954:

'After the jury was discharged at the end of the morning session, at the request of the newspapers, the jury was brought back into the room and sat in the room for a matter of—how long, 15 minutes, 10 minutes?

'Mr. Clifford: 10 minutes, yes.

'Mr. Corrigan: (Continuing) And were subjected to photography, photographing and television cameras by at least 10 cameramen who mounted themselves on chairs, the judge's bench and various parts of the room. This was all done out of the presence of defendant, Sam Sheppard.')

"MR. CORRIGAN: I also want to introduce, as part of my motion, Defendant's Exhibits 63, 64 and 65.

"(Defendant's Exhibits 63, 64 and 65 were marked for identification.)

"MR. CORRIGAN: When the jury visited the premises yesterday under the order of the Court, there was at least 40 reporters there, a great number of cameramen, and the Cleveland Press hired a helicopter which continued to swing over the house and take pictures with a great deal of noise and racket.

"When the jury went through the house, it was accompanied by a reporter of the Cleveland Press, Mr. Brady.

"So I renew all my motions at this time.

"THE COURT: They all be overruled, and exceptions noted."

(It should be noted that subsequent discussion developed that Brady's accompaniment of the jury at the Sheppard home had been with the trial judge's prior knowledge and

with the consent of the defense, which had been given by one of defendant's attorneys.)

Monday evening, November 22, the trial record shows still another objection to news media trial privileges, the rulings of the trial judge denying requested relief, and a cautioning of defendant's brother concerning trial publicity.

"MR. CORRIGAN: I desire to renew my motion for a chance of venue and a continuance of this case. Ever since we have started in this case, the halls and the rooms surrounding the Court House—or, surrounding the court room have been filled with reporters and photographers and television operators.

"The assignment room and the witness room have been occupied entirely by newspaper reporters, radio and television operators. On each morning the defendant has been brought into court at least 10 minutes before the beginning of the trial, and then for that period of time has been subjected by many photographers and television cameras, against his will, to be photographed.

"This morning—what is today?

"THE COURT: The 22nd.

"MR. CORRIGAN: November 22nd, there was erected in front of the Court House television cameras, WNBK. They were there when the jury was entering the Court House. The judge participated in being televised, as did Mr. Mahon and Mr. McArthur.

"We, therefore, renew the motions heretofore made, ask for the withdrawal of a juror and a continuance of the case.

"THE COURT: Of course, that will be overruled and exceptions noted.

"MR. CORRIGAN: Now, then, we request the court that the rights of the defendant be protected in this

court room, and that he be not compelled to submit to photographing and the television camera as he has been every morning with the knowledge of the court.

"We request that the Sheriff be ordered not to bring him into court until such time as the jury is seated.

"THE COURT: Well, that is more than one request. The court will make his position clear.

"First, there has been no photographing in the court room except upon strict orders of the court that it was to be done before court hours in the morning or after court hours in the evening and with the consent of counsel for the defendant.

"MR. CORRIGAN: I have given no consent to that.

"THE COURT: And let the record show that counsel for the defendant and the defendant, himself, have been voluntarily photographed in the court room from time to time during the progress of this trial.

"MR. CORRIGAN: I haven't been voluntarily photographed. Neither has the defendant. We have been compelled to be photographed. We can't escape it.

"THE COURT: Oh, no, I don't think that is so, Mr. Corrigan, and the court will say to you that the defendant is not to be photographed in the court room at all without your consent.

"MR. CORRIGAN: Well, if there has been any consent by anybody in this matter, the consent is withdrawn.

"THE COURT: All right. Now, as to the defendant being brought into the court room he is to be brought into the court room prior to the opening of the trial each day and just before the jury enters. That has been our effort since the beginning of this trial.

"Now, the Court wants to say a word. That he was told—he has not read anything about it at all—but he was informed that Dr. Steve Sheppard, who has

been granted the privilege of remaining in the court room during the trial, has been trying the case in the newspapers and making rather uncomplimentary comments about the testimony of the witnesses for the State.

"Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case.

"The Court appreciates he cannot deny Steve Sheppard the right of free speech, but he can deny him the right of the privilege of being in the court room, if he wants to avail himself of that method during the progress of the trial.

"MR. CORRIGAN: The statement of the Court about Steve Sheppard making uncomplimentary remarks about the testimony of witnesses is paralleled by the tremendous amount of publicity that is put in the Cleveland newspapers, especially headlines, since the beginning of this case, which has misrepresented entirely the testimony."

These motions for change of venue, continuance, and mistrial were renewed repeatedly thereafter (including the close of prosecution proofs and the close of defense proofs) and were similarly denied.

DUE PROCESS VIOLATIONS

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[9] Justice Oliver Wendell Holmes.

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[9] *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907).

It is, of course, too late in legal history to doubt the power and the duty of a federal District Court to review on habeas corpus a state court conviction claimed to have been based upon violations of applicable federal constitutional commands. 28 U.S.C. § 2241; *Fay* v. *Noia*, 372 U.S. 391 (1963); *Townsend* v. *Sain*, 372 U.S. 293 (1963); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

It is likewise beyond challenge that the "due process" requirement of the Fourteenth Amendment[10] mandates state criminal court observance of minimum federal constitutional standards such as trial on a charge "fairly made and fairly tried in a public tribunal" before "an impartial judge," *In re Oliver*, 333 U.S. 257, 278 (1948); *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955); an "impartial jury" (if, as all do, the state elects a jury system), *Irvin* v. *Dowd*, *supra* at 721-722; *Rideau* v. *Louisiana*, *supra;* and a "verdict . . . based upon the evidence developed at the trial," *Turner* v. *Louisiana*, *supra* at 472. See also *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

In January of 1965 the United States Supreme Court said:

> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. [See footnote.] 'The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.' *Sinclair* v. *United States*, 279

[10] The Fourteenth Amendment to the United States Constitution provides in applicable part: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; . . ."

U.S. 749, 765. Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.' *Frank* v. *Mangum*, 237 U.S. 309, at 349 (dissenting opinion).

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public court room where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. . . ."

[Footnote] "The Sixth Amendment provides:
'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed. . . .' (Emphasis supplied.)"

Turner v. *Louisiana*, *supra* at 472-473.

If ever a jury could be said to be likely to have been impregnated by the environing atmosphere," it was surely this jury. And I do not see how this Court can safely conclude that the jury verdict was based only on "the evidence developed against defendant . . . from the witness stand."

However applicable to this trial these standards may be, they are also generalizations. I would affirm the District Judge's writ in this case on the basis of specific due process violations which occurred during trial an for all of which there were both preventive measures beforehand and remedies afterward available to, but unused by, the trial judge.

At trial the principal issues upon which testimony was presented to the jury were 1) motive, 2) credibility, and 3) reputation. On each issue the evidence presented and

inferences argued by prosecution and defense were in sharp conflict. On each issue the jury could have believed either side.

But on these same crucial issues, as the trial progressed the news media supplemented the total record with material never heard in the courtroom. Much of this material though highly prejudicial to defendant, was relevant and admissible if a witness could have been found who was prepared to testify to it under oath in the courtroom and face cross-examination. Some material, though equally prejudicial, was obviously inadmissible under any circumstances.

The United States District Judge listed 30 different instances of objectionable news media communication which he felt were prejudicial. We shall discuss only five of these.

1. On Friday, November 19, 1954, a police officer of the Cleveland Police Department gave testimony during this trial which tended to contradict some portions of defendant's statements as made to the Cleveland Police.

On November 21, at 6:30 p.m., there was a radio broadcast which was heard in Cleveland over Station WHK in which Mr. Robert Considine made a comparison between defendant and Alger Hiss. Defendant's confrontation by Officer Shottke was compared to Alger Hiss' confrontation with Whittaker Chambers.

At the time in 1954, Alger Hiss' conviction was fresh in the national consciousness.

Robert Considine was one of the national commentators occupying reserved seats in the courtroom during this trial.

On November 22, at the commencing of court, defendant's counsel moved for a continuance of the trial, based on prejudice resulting from the Considine broadcast and asked the trial judge to question the jury as to whether they heard the broadcast.

The judge denied both motions, saying in part:

"Well, I don't know, we can't stop people in any event, listening to it. It is a matter of free speech, and the court can't control everybody.

"Mr. MAHON: I think that the court has instructed the jury that they are not to read about it or listen to the broadcasts. It was a general instruction that was given at the time the trial started.

"The COURT: We are not going to harass the jury every morning.

"MR. CORRIGAN: I can't help it, Judge. If you don't, that's all right with me. I make my exception.

"THE COURT: It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury, and we must have confidence or the jury system is of no value whatever to anybody."

Prior to dealing with this motion, the trial judge (as we have noted) had just denied a defense motion for continuance based upon a television program conducted on the steps of the courthouse the same morning, where among others, the prosecutor and the trial judge had appeared. The trial judge's picture at this appearance was published in one of the Cleveland papers on the day these motions were heard and denied (See Appendix C).

2. On November 24 The Cleveland Press published a front page eight-column headline: "Sam Called a 'Jekyll-Hyde' by Marilyn, Cousin to Testify." The first three paragraphs of the news story follow:

"Two days before her death, murdered Marilyn Reese Sheppard told friends that her accused husband, Dr. Samuel H. Sheppard, was 'a Dr. Jekyll and Mr. Hyde.'

"The prosecution has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper—

countering the defense claim that the defendant is a gentle physician with an even disposition.

"One of Mrs. Sheppard's 'Dr. Jekyll and Mr. Hyde' statements was made to Bay Village Mayor J. Spencer Houk as recently as last June, The Press learned." (See Appendix J).

No such testimony was ever introduced at the trial.

Five of the jurors had testified that they received The Cleveland Press at their homes.

On November 26 defense counsel renewed his motions for change of venue and continuance and a mistrial, basing them on the Jekyll-Hyde story in The Cleveland Press, which he introduced as an exhibit (See Appendix J).

Defense Counsel also based his motions on a Thanksgiving Day edition of The Cleveland Press which contained pictures and interviews in the home of Mrs. Mancini—one of the jurors (See Appendix I).

The trial judge, without reference to the Jekyll-Hyde matter, overruled the motions, noting that Mrs. Mancini had not been home at the time of the interview and picture taking. He made no inquiry of the jurors as to either matter.

3. On December 5, Walter Winchell, in a nationwide broadcast heard and seen in Cleveland through WXEL television and WJW radio, stated that a Carol Beasley, who was under arrest in New York for robbery, had stated that she was defendant's mistress and had had a child by him.

On December 6 these facts were related to the trial judge who responded:

"THE COURT: Well, even, so, Mr. Corrigan, how are you ever going to prevent those things, in any event? I don't justify them at all. I think it is outrageous, but in a sense, it is outrageous even if there were no trial here. The trial has nothing to do with

it in the Court's mind, as far as its outrage is concerned, but—

"MR. CORRIGAN: I don't know what effect it had on the mind of any of these jurors, and I can't find out unless inquiry is made.

"THE COURT: How would you ever, in any jury, avoid that kind of a thing?"

At defense counsel's insistence the judge did query the jury as to whether any had heard the Walter Winchell broadcast the previous night. Two jurors responded that they had.

Thereupon the judge asked, "Would that have any effect on your judgment?" Each said, "No."

The trial judge accepted this inadequate assurance.[11] He did not reprove the two jurors for failing to heed his "suggestion" that they not listen to TV or radio. He did not order them or the rest of the jury not to do so again. He told the jury "to pay no attention whatever to that type of scavenging." He then proceeded with the trial.

4. On December 9, 1954, defendant took the witness stand.

During part of his direct testimony he testified to oral promises and oral abuse by various members of the Cleveland Police Department Homicide Bureau who interviewed him extensively after his arrest.

On December 11, the Cleveland News, printed a front page story under the headline "'Bare-Faced Liar,' Kerr says of Sam." The story quoted Captain David E. Kerr, head of the Homicide Bureau, to the same effect and adding:

"'If ever a person was handled with kid gloves, it was Dr. Sam,' said Kerr. 'In 800 homicide cases we have not had a single voice raised against our meth-

[11] Cf. *Coppedge* v. *United States*, *supra*.

ods, until this one from the Bay Village doctor.'" (See Appendix K).

Captain Kerr never appeared as a witness at the trial.

5. After the close of evidence and the arguments and the charge had been given, this jury was locked for its deliberations on verdict. These continued for five days and four nights. Subsequent to the rendering of the verdict it became known to the defense that the individual jurors had been permitted repeated phone calls to their homes. This knowledge was made the basis for a motion for new trial made by defense counsel.

The stipulation of facts agreed on by the parties before the United States District Judge gives the details on this issue:

> "After arguments and charge were complete, the jury was directed to retire to deliberate its verdict. They were placed in charge of two bailiffs, Edgar Francis and Simon Steenstra. The deliberations lasted for more than four days, during which time the jury was kept (except when at court deliberating) in the Carter Hotel in downtown Cleveland. They, together with the bailiffs, occupied the entire seventh floor of the hotel. Bailiff Steenstra had made arrangements whereby the telephones in the rooms occupied by the jurors were disconnected so that no calls could be placed or received.
>
> "The record does not indicate the times, the number of calls, or the identity of the juror-callers, but it is clear that both Steenstra and Francis permitted jurors to place outside calls from their (the bailiffs') rooms between the time the jury took the case (December 17, 1954) and the time the verdict was rendered (December 21, 1954). The calls were placed by the jurors. No records were kept as to the numbers called, the parties called, talked with, or the calling

jurors. The bailiffs sat next to the phone as the conversations took place, but could only hear that half of the conversation made by the juror; what was said *to* the jurors could not be heard by the bailiffs. The Court was never asked for permission to allow the jurors to make these calls, and no permission was ever given." (Emphasis in original)

THE UNITED STATES DISTRICT JUDGE'S HOLDINGS

Concerning the first four of the events we have cited (and others) Judge Weinman said:

> "[S]pecial note must be given to the attempt of the newspapers to influence the jury. It was startling to find photographs of the entire jury and of individual jurors (at times giving their home addresses) in no less than 40 issues of the Cleveland newspapers. The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting." *Sheppard* v. *Maxwell*, 231 F. Supp. 37, 63 (1964).

> "It is clear beyond doubt, because of the sheer volume of publicity which attended the trial, that the jury read and heard about the case through the news media." (Footnote omitted.) *Sheppard* v. *Maxwell*, *supra* at 62.

Rule 52(a) of The Federal Rules of Civil Procedure states in part that "findings of fact shall not be set aside unless clearly erroneous. . . ." This rule is applicable to review of federal habeas corpus proceedings. *United States ex rel. Crump* v. *Sain*, 295 F.2d 699 (C.A. 7, 1961), *cert.*

denied, 369 U.S. 830 (1962); *Rushing* v. *Wilkinson*, 272 F.2d 633 (C.A. 5, 1960). See also Cases Annotated at n.57, 28 U.S.C.A. Rule 52.

In this trial all jurors, save one, freely admitted reading about the case before trial.

This jury was never locked up for the nine weeks of trial.

At least seven of the jurors took newspapers at their homes. Five of them took The Cleveland Press. The news media were given extraordinary prominence and privileges in the courtroom.

No admonition of an unequivocal nature concerning the jury not reading or listening to material about the trial was given until after a month of testimony.

The judge allowed himself and the jury all through the trial to be the constant subject of newspaper photography.

When queried on the one occasion when inquiry was allowed, two jurors testified to hearing the Walter Winchell broadcast.

They were not reproved nor were they or the other jurors told not to do it again.

The two newspaper stories were front page stories in newspapers of general circulation. The Cleveland Press "Jekyll-Hyde" story was topped by an eight-column double banner front page headline.

The two broadcasts were by nationally prominent commentators broadcasting on prime time in Cleveland.

With these facts before us, I do not see how we can say that the District Judge's holding is "clearly erroneous."

The District Judge's opinion in respect to these instances of prejudicial trial publicity is founded upon ample precedent.

Newspaper articles actually read by a juror or jurors which convey highly prejudicial information not admissible or admitted at trial have long been recognized as constituting such essential unfairness as to justify the

setting aside of the verdict and the granting of a new trial. *Mattox* v. *United States, supra; Krogmann* v. *United States, supra.*

Where flagrantly prejudicial newspaper articles are prominently printed in newspapers of general circulation during a trial wherein the jury is not sequestered, there is a presumption that some jurors have seen them and that defendant has been prejudiced thereby. *Harrison* v. *United States,* 200 Fed. 662 (C.A. 6, 1912); *Marson* v. *United States, supra; Krogmann* v. *United States, supra; Briggs* v. *United States,* 221 F.2d 636 (C.A. 6, 1955).

Unless this presumption of prejudice is overborne by careful inquiry of the jurors and, in appropriate cases, by strong admonitions to disregard, a motion for new trial should be granted. *Krogmann* v. *United States, supra; Marson* v. *United States, supra; Briggs* v. *United States, supra; United States* v. *Accardo, supra.*

As we have seen, the admonitions in this trial were infrequent and equivocal when given. And minimal inquiry was limited to the single instance of the Winchell broadcast.

In concurring in *Irvin* v. *Dowd,* Mr. Justice Frankfurter said:

> "Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. . . . For one reason or another this Court does not undertake to review all such envenomed state

prosecutions. But, again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome. *Janko* v. *United States, ante,* p. 716; *see, e.g., Marshall* v. *United States,* 360 U.S. 310. See also *Stroble* v. *California,* 343 U.S. 181, 198 (dissenting opinion); *Shepherd* v. *Florida,* 341 U.S. 50 (concurring opinion)." *Irvin* v. *Dowd, supra* at 730 (concurring opinion.)

In my opinion "the disregard of fundamental fairness is so flagrant" in this case as to require the District Judge's writ.

On the fifth issue, pertaining to juror phone calls during jury deliberations, Judge Weinman found:

"This Court finds prejudicial error because the right to a fair and impartial trial as guaranteed by the due process clause of the Fourteenth Amendment includes the right to have a jury which is not permitted, after it begins its deliberations, to have unmonitored telephone conversations with third persons. As stated quite simply in *Mattox* v. *United States,* 146 U.S. 140, 150.

'Private communications, *possibly* prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear.' (Emphasis added.)

"There is nothing in the record to show the harmlessness of that part of the telephone conversations which the bailiffs could not hear. Accordingly, petitioner's constitutional rights were violated." *Sheppard* v. *Maxwell, supra* at 71.

Here too, the District Judge has sound precedent in support.

The federal courts (including the United States Supreme Court and this Court) have created and given effect to the presumption that any unauthorized communication with a juror is prejudicial absent effective rebuttal. *Mattox* v. *United States, supra; Stone* v. *United States, supra; Little* v. *United States, supra; Wheaton* v. *United States, supra; Johnson* v. *United States,* 207 F.2d 314 (C.A. 5, 1953), *cert. denied,* 347 U.S. 938 (1953); *Ryan* v. *United States,* 191 F.2d 779 (C.A. D.C., 1951), *cert. denied,* 342 U.S. 928 (1951).

The presumption is even stronger when there is communication with a member or members of the jury after charge and during jury deliberation concerning the verdict. *Mattox* v. *United States, supra; Wheaton* v. *United States, supra; Little* v. *United States, supra.*

In 1892 Chief Justice Fuller, speaking for a unanimous Court, said:

> "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering, may be reason for a new trial, variously held as absolute; or *prima facie,* and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place. Wharton, Cr. Pl. and Pr. § § 821, 823, 824, and cases cited.
>
> "Private communications, possibly prejudicial between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox* v. *United States, supra* at 150.

There is absolutely no way by which we can know that these phone calls—totally unmonitored as far as the outside party is concerned—were harmless. I believe that Judge Weinman was correct in relying on this ground also.

THE OPINION OF THE COURT

For the reasons stated, I find myself in disagreement with the Court concerning the fundamental issues of this appeal.

My brothers have, however, written a careful and scholarly opinion. I concur with the result reached in three out of the five of the issues discussed therein.

The federal courts, of course, do not review claimed federal constitutional violations until state remedies have been exhausted. Thorough as have been petitioner's efforts in this regard, it cannot be clearly established that claimed violations of defendant's Fifth Amendment rights (through lie detector testimony) have been presented to the Ohio Supreme Court. Nor have the belated witness statements as to the trial judge's comments on defendant's guilt ever been considered by that body.

I also agree with my brothers that the clamorous and frequently abusive publicity *prior* to trial, plus the trial judge's denial of change of venue, probably did not, of themselves, rise to the level of constitutional violations.

As Judge O'Sullivan notes, the number of jurors with fixed opinions about this case as of the time the jury was seated does not show the same extent of deep and abiding community prejudice demonstrated in *Irvin* v. *Dowd, supra,* and *Rideau* v. *Louisiana, supra.*

Of some weight in the consideration of the pretrial publicity issue is a concern for that particular declaration of rights which our forefathers chose to put first among the amendments. If the exercise of freedom of speech or press

in reporting or exposing crime could serve to immunize a person charged with crime from prosecution and trial, shortly the demands for limitation of this historic right would become extremely pressing. The smarter criminal would know how to find a means to immunize himself from trial by securing publication of a well-timed if adverse story. The power of the press to aid in maintaining the integrity of government by exposing corruption or special privilege would be largely nullified.

In one of the relatively few cases where the United States Supreme Court has set aside State court convictions because of pretrial publicity, Mr. Justice Clark noted:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies* v. *Illinois,* 123 U.S. 131; *Holt* v. *United States,* 218 U.S. 245; *Reynolds* v. *United States, supra.* [98 U.S. 145]." *Irvin* v. *Dowd, supra* at 722-23.

To return to the basic problems of this appeal, it is clear that the District Judge considered the claimed violations of due process against the background of the trial itself and cumulatively in relation to each other. His opinion notes:

> "Any one of the above mentioned factors, i.e., the insidious, prejudicial newspaper reporting, the refusal of the trial judge to question jurors regarding an alleged prejudicial radio broadcast and the carnival atmosphere which continued throughout the trial, would be sufficient to compel the conclusion that petitioner's constitutional rights were violated. But when they are cumulated, this Court cannot, unless it were to stretch its imagination to a point of fantasy, say the petitioner had a fair trial in view of the publicity during trial." *Sheppard* v. *Maxwell*, *supra* at 63.

Against this view, I read the Court's opinion as holding that no one of the complaints of contacts or communications with this jury was sufficient *standing alone* to represent invasion of petitioner's due process rights.

If we were to assume that the five instances of unauthorized communications to this jury, considered as entirely isolated incidents, did not rise to constitutional magnitude,[12] we still could not by such dissection of this trial ignore our constitutional duty to look at the trial as a whole and to determine from the total record whether the Fourteenth Amendment command of due process had been violated.

These five events which occurred during this trial, when considered cumulatively and against the trial background related at the outset, leave no doubt of the validity of the District Judge's holding that "petitioner was not afforded a fair trial as required by the due process clause of the Fourteenth Amendment."

Any other view would deny common sense as effectively as saying that since no single one of the 35 wounds was necessarily fatal, Marilyn Sheppard was not murdered.

Patently there can be judicial error which against the

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[12] As to the instances of communications numbered 1, 2, 3, and 5 herein, there is little reason to accept such an assumption.

background of one case might be harmless, but which against the total circumstances of another case might violate substantial rights. *United States* v. *McMaster and Wolff*, . . . F.2d . . . (C.A. 6, 1965) (Nos. 15,828-29, Decided March 25, 1965. Cf. *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

The background facts of a case wherein due process violations are claimed are never irrelevant. *Irvin* v. *Dowd*, *supra; Rideau* v. *Louisiana*, *supra.*

In *Marshall* v. *United States*, 360 U.S. 310 (1959), the United States Supreme Court dealt with a claim of prejudice because inadmissible material from news accounts had reached the jury during trial. Noting the large discretion that the trial judge had in ruling on the issue of prejudice, the Court nonetheless reversed for a new trial stating that "each case must turn on its special facts."

The "special facts" of this case compel my vote for affirmance. They come as a distinct shock to the conscience of this former state court judge.

As we have noted, Judge Weinman's duty to review petitioner's federal constitutional claims concerning his state court trial cannot be disputed. *Fay* v. *Noia*, *supra; Townsend* v. *Sain*, *supra; Gideon* v. *Wainwright*, *supra.*

I read such cases as *Turner* v. *Louisiana*, *supra; Rideau* v. *Louisiana*, *supra; Irvin* v. *Dowd*, *supra*, as applicable *a fortiorari* to the fact situation heretofore outlined and as authority for issuance of the writ, unless a new trial is ordered.

I would affirm.

APPENDIX A

PRETRIAL ORDER
AGREED STATEMENT OF FACTS

"Petitioner, Samuel H. Sheppard, was in July, 1954, a resident of Bay Village, Ohio, a suburb on the west side of Cleveland. He was a doctor of osteopathic medicine, specializing in Surgery, and a member of the staff of the Bay View Hospital. He was thirty years of age and was married to Marilyn Reese Sheppard, also thirty. They had been married for nine years and had one son, aged seven. Petitioner and his family lived in a house on the shore of Lake Erie, which house was owned by Marilyn. Petitioner was associated in the practice of medicine with his father and two older brothers, all doctors. He was in comfortable financial circumstances.

"On the night of July 3, 1954, petitioner and his wife entertained friends, Don and Nancy Ahearn, in their home. The Ahearns left at approximately 12:30 a.m., July 4, 1954; Marilyn saw them to the door, for petitioner was or appeared to be asleep on a couch in the living room. The evening had been a congenial one, and the Ahearns observed no indications of hostility between petitioner and his wife (who was pregnant) at any time during the evening. In fact, there were overt manifestations of affection between them.

"Shortly before 6:00 a.m. a telephone call was received from petitioner by J. Spencer Houk, mayor of Bay Village and a friend of petitioner. Houk lived two houses distant from the home of petitioner. Houk heard petitioner say:

> 'My God, Spence, get over here quick, I think they have killed Marilyn.'

Houk dressed and with his wife, Esther, drove within a short time the few hundred feet to petitioner's home. Upon arrival the Houks found petitioner on the first floor of the

house. His face showed some injury, and he complained of pain in his neck. Esther Houk went up to the bedroom, at the suggestion of petitioner, to check on the condition of Marilyn Sheppard. She found Marilyn lying in a pool of blood on the bed. She was dead. The room was covered with splattered blood. It was determined that she had suffered some thirty-five blows about the head by some blunt instrument, causing death. There was some conflict as to how long she had been dead when discovered by the Houks.

"The story given by petitioner to police and at the trial, was substantially as follows: As he was sleeping on the couch, he was awakened by a noise coming from the second floor. He thought he heard his name called. He went up the stairs, which was dimly lit by a light in the hall. He recognized only a white 'form' standing next to the bed where his wife slept. He grappled with the form, and was struck on the back of the neck which rendered him unconscious. Before losing consciousness petitioner heard loud moans, as if from someone injured. When petitioner recovered consciousness, he examined his wife, found or thought that she was dead, determined that his son (in an adjacent room) had not been harmed, and then, hearing noise of some sort on the first floor, ran down. He saw a form running out the door of the house nearest to Lake Erie, and pursued it to the shore. There he struggled again, and again lost consciousness. When he came to, he went back to the house, re-examined his wife, and called Mayor Houk. Petitioner was unable to establish (1) the number of people in the bedroom at the time of the first encounter or the time of said encounter; (2) the duration of his unconsciousness on either occasion, or (3) the sex or identity of any of the single or several assailants he encountered. He stated that his perceptions had been vague because he was asleep at the outset of the chain of events, and unconscious twice as it progressed.

"In the course of interrogations by police and the County Coroner, petitioner was asked if he had had sexual relations with one Susan Hayes, an ex-employee of the hospital, in March, 1954, in Los Angeles. Petitioner denied this, but later admitted it when confronted with her statement of the affair. The state contended that Miss Hayes was the motive for a premeditated murder, but the jury returned a verdict of murder in the second degree.

"The murder of Marilyn Sheppard captivated the attention of news media in an unprecedented manner. Editorials on the first page of a leading Cleveland newspaper, and news media generally, set up a hue and cry for a solution to the crime. An inquest was demanded and held, and petitioner's arrest was suggested most strongly by at least one leading newspaper. On July 30, 1954, petitioner was arrested; he was admitted to bail, and indicted a few days later, on August 17, 1954. He has been in custody ever since.

"The trial began on October 18, 1954, and on December 17 of the same year the cause was submitted to a jury in the Court of Common Pleas of Cuyahoga County. On December 21st the verdict of guilty of murder in the second degree was returned, and petitioner was sentenced to life imprisonment in the state penitentiary at Columbus, Ohio. . . .

"The details of the trial, which fill over seven thousand pages in the bill of exceptions, are not recited here; it is the understanding of counsel for both sides that it was not the purpose of this history to describe the voluminous evidence.

"On January 3, 1955, the trial court overruled a motion for a new trial which had been based on numerous assignments of error occurring during trial and deliberation. . . .

"On May 9, 1955, the trial court denied a supplemental motion for new trial on ground of newly discovered evidence

and based upon the affidavit of Paul Leland Kirk, a criminologist, who claimed to have demonstrated that blood tests made in the murder room proved the existence of blood which did not come from the defendant or the deceased. This evidence was not obtained until after the verdict had been returned.

"On July 20, 1955,[1] the Court of Appeals of Cuyahoga County affirmed the conviction of petitioner; and on July 25, 1955 the same Court affirmed the denial of the second motion for new trial. . . .

"On May 31, 1956, the Ohio Supreme Court affirmed the action of the Court of Appeals as to the case in chief, but did not discuss or pass upon the alleged newly discovered evidence. Two Judges dissented, expressing the view that Sheppard should be accorded a new trial. . . .

"On November 14, 1956, the Supreme Court of the United States denied a petition for certiorari; application for rehearing was denied on December 19, 1956. . . .

"On September 5, 1960, Chief Justice Weygandt denied an application for a writ of habeas corpus in the Ohio Supreme Court; the petition therefor was dismissed on May 5, 1961.

"On April 11th, 1963, petitioner filed a petition for a writ of habeas corpus in this Court, which is the action giving rise to this order.

"Petitioner, Samuel H. Sheppard, has at all times maintained that he was not guilty of the murder of his wife, and that he knew no more about said death than he told at the trial."

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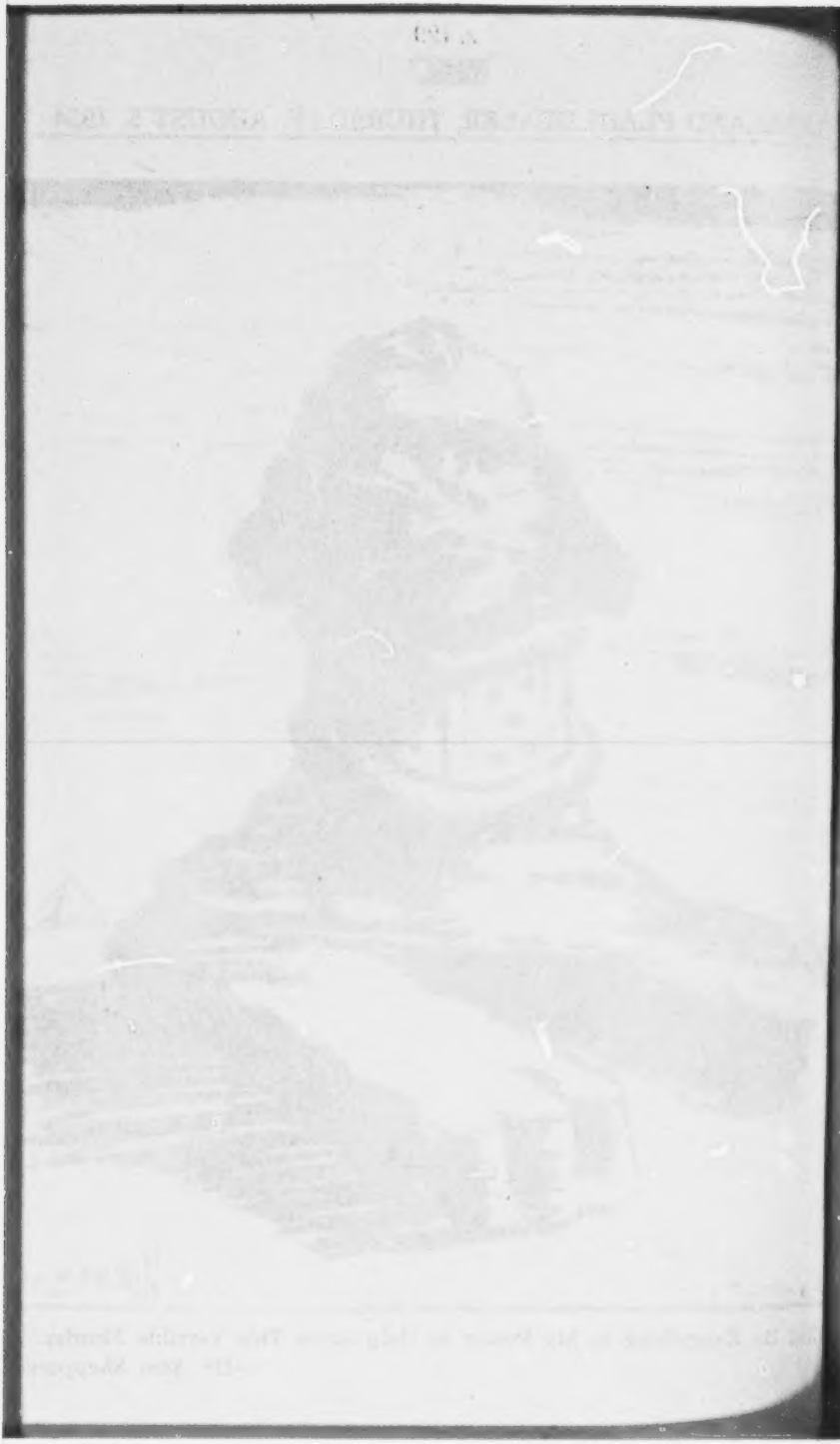
[1] "It is a minor point, but the Court notes that several of the dates of decisions are incorrectly stated."

CLEVELAND PLAIN DEALER, THURSDAY, AUGUST 5, 1954

Will Do Everything in My Power to Help Solve This Terrible Murder."
—Dr. Sam Sheppard



THE COORDINATOR.

The November 1, 1954, issue of *The Coordinator,* a semi-monthly news letter of the American Bar Association, carried the following:

"PRESS SOUNDS ALARM ABOUT SHEPPARD TRIAL PUBLICITY

Some sections of the press are worried about the sensational publicity accorded the Dr. Sheppard trial in Cleveland. Editor & Publisher, leading trade paper of the Fourth Estate, says in an editorial in the October 23 issue:

'Newspaper reporters, photographers, editors, TV and movie cameramen seem intent on creating a circus of the Dr. Sheppard trial. If the coverage continues in the same sensational vein of the opening days, it could set the cause of courtroom photography back 20 years (even though they operate in the courtroom only when it is not in session) and do irreparable damage to the newspapers' fight against the charges of "trial by newspaper."

'The trial is certainly of wide national interest and the judge so recognized it by agreeing to turn over practically all the spectator seats to newspaper and radio reporters. Pictures are permitted while the court is not in session. But it seems to us that in exercising these rights and privileges, the working press has created a spectacle that certainly will not reflect to the advantage of the press as a whole, meaning all media represented there, and provides ammunition to the critics. All the old-fashioned sensational techniques have been dusted off for this trial including the "sobsister" approach. It is not too late for newspaper editors, and editors of other media, to stop the practices which can only redound to the discredit of all media.' "

NEWSPAPER INSTITUTE OF AMERICA.

The Newspaper Institute of America, 1 Park Avenue, New York, in commenting on the Sheppard trial, stated:

> "Coverage of the Sheppard murder trial in Cleveland has been a disgrace to American journalism and brought back all the traditions of yellow journalism."

EDITOR AND PUBLISHER.

Commenting on this charge in the December 4, 1954 issue of *Editor & Publisher,* Editor Robert U. Brown agreed, with one qualification. Brown thought "the guilty parties are a small minority of the daily newspapers and confined almost exclusively, to some, but not all, in the large metropolitan cities." "A trial for murder is supposed to be a serious business," Brown wrote, "but as the Sheppard trial has lagged in developing headline revelations, reporters have resorted to interviewing jurors' families, interviewing each other, analyzing the case on the basis of evidence not yet admitted, interviewing personalities on the courthouse steps for a television program, etc."

EDWIN M. OTTERBOURG.

Edwin M. Otterbourg, Past President, New York Lawyers Association, and Chairman, Special Committee on Fair Trial and Free Press,

> (See also "Fair Trial and Free Press" by Mr. Otterbourg, New York State Bar Bulletin, April 19, 1955, page 103.)

addressed the Prosecuting Attorneys Association of Ohio, at the Hotel Statler, Cleveland, on December 11, 1954. This address was made while the case of the State of Ohio vs. Sheppard was in progress. In that speech, which was published in the Bulletin of the Cuyahoga Bar Association for January, 1955, he stated:

"Before the current trial referred to commenced, a leading newspaper in one of your important neighboring cities said:

'As a newspaper, we are rather frightened by the way in which the case * * * is being tried in the press. It is the function of our judicial authorities to present the facts under the strict laws of evidence to 12 good men and true and let them pass judgment on them. But how can that successfully be done if facts and rumors, hearsay, and innuendoes are all run together in sensational newspaper stories before the case ever comes to trial?'

The newspaper articles contain predictions of forthcoming testimony long before it has been offered in court, and some of them print testimony which was stricken out at the trial by the Court. Personal likes and dislikes are highlighted by constant characterizations of both testimony and of witnesses; thus, certain testimony is characterized as being 'most damaging' and other as being 'shaky' or being 'gingerly' and 'unwillingly' given. Even in an account of the trial, it has been reported that copies of certain exhibits have been mailed out by the district attorney's office, and to whom and for what purpose.

In this reckless competition for copy, it even happened that a reporter was sent to the home of a juror while the trial was going on to take photographs of his family, home surroundings and the like!

They have no more right to do these things than they have to invade the secrecy of the ballot box by asking a voter what he did."

"THE ASHEVILLE CITIZEN.
Thursday, December 23, 1954

THE SHEPPARD CASE

A second degree murder conviction has closed the Sheppard murder case for the time being, though hardly on a note of public satisfaction. The verdict, built on the merest circumstantial evidence, must strike many persons as utterly preposterous.

Dr. Samuel (the "Sam" of the tabloids) Sheppard may have dispatched his pregnant and evidently loving wife in the brutal manner related. But Ohio apparently applies strange construction to motivations and evidence. The state did not establish a motive that anybody in his adult right mind and unaddicted to soap operas could possibly credit. It did not produce a murder weapon. On the other hand, it introduced evidence of doubtful relevancy from witnesses who might have been bounced out of the ordinary courtroom. Ohio justice, if that is what it is, wears a strange countenance indeed.

Of course, Dr. Sheppard was not really tried for murder. He was tried for manifold and specified sins and indiscretions which, while offensive to society, do not rate a murder rap. And in this the irresponsibles of American journalism had such a heady fling as they have not enjoyed since the days of Hall-Mills, Snyder-Gray, and Daddy and Peaches Browning—historic orgies of the press excusable only because they happened in the madcap 1920's.

One is reminded of William Randolph Hearst's famous cablegram to his correspondent in Cuba in 1898: "You furnish the pictures and I'll furnish the war." The Sheppard case was a set-up for the sob sisters and the little minds who write suggestive headlines. So, despite the defendant's convincing show of innocence on the stand and under the bright lights of a skull session with Cleveland detectives, the Lothario-doctor-ne-er-do-well was a gone

goose from the time the trial got into its second week. For 12 men and women who were more a Greek chorus than a trial jury gave back just what they were fed out in as notorious and vulgar a travesty on justice as ever affronted the dignity of the law in America."

NEWS WEEK.

News Week, January 3, 1955, carried an article entitled, "Disgraceful":

> "Nearly 30 years ago the late Adolph Ochs, publisher of the New York Times, issued a definitive statement on newspaper coverage of murder. When asked why the usually crime-wary Times was playing up the sensational Hall-Mills slaying, he explained:
>
> 'The yellows see such stories only as opportunities for sensationalism. When the Times gives a great amount of space to such stories it turns out authentic sociological documents.'

Sensationalism or sociology, the story of Dr. Sam Sheppard has consumed an astonishing amount of newsprint since the early morning of July 4, when the young osteopath reported that someone had bludgeoned to death his pregnant wife in their fashionable home in a Cleveland suburb. The story snowballed to such an extent that, after Dr. Sam's trial began in mid-October, one-third to one-half of the nation's newspapers were front-paging daily developments.

Was such feverish coverage justified? In Cleveland, Louis Seltzer, editor of the Press, whose July editorials 'Someone is Getting Away with Murder' were a big factor in getting Dr. Sam arrested, had a clear conscience: 'This is the first time in a generation that a murder case appeared to embrace all the classical ele-

ments of mystery, sex, effort to thwart justice, and intrigue * * *. We at the Press did an honest, forthright journalistic job in bringing the case to justice.' The night of the verdict, the Press sold 30,000 extra papers."

THE PROGRESSIVE.

The Progressive, Madison, Wisconsin, January, 1955:

"Both papers publish handy indexes on page one to direct traffic to the many fruity bits of trial coverage elsewhere in the paper. The Press excels at a daily compendium of 'sidelights' or program notes. In both papers, the trusty sidebar is the city editor's best friend (Sidebar: a subsidiary story, often of a light or humorous character, illuminating some incidental aspect of the news). Thus you read that Judge Blythin takes the most comprehensive notes of any of the principals, that a smile flickered across the face of Juror Barrisch when Witness Ahern told how his wife sat on his lap; that two Texas ladies, in Cleveland for a convention, visited the trial and sociably gave reporters their views on women as jurors. What the ladies are wearing, how visiting lawyers appraise the technical performance of prosecution and defense, anecdotes and random impressions—all are set down in a relaxed, gossipy way, as if the event were a ball game or a gala concert.

The Press almost always reports the trial in terms of Dr. Sam's reaction to it. Thus on Tuesday he 'scowled and reddened' at the testimony of Mrs. Ahern. On Wednesday his face 'reddened' at the testimony of Mrs. Houk. On Thursday the death photos of his wife, which were shown to the jury but not to him, gave him a 'bad time,' and an imported Scripps-Howard expert reported that Dr. Sam 'couldn't take it'—he 'put one hand to his face and looked down at

the floor. His lips moved. He gulped hard. His body jerked nervously.'

And so it went, week after week. That the public was eating up the story, the Cleveland papers never doubted. One week a barber from Pennsylvania, wearing a green vest and white gloves with the fingers cut out, picketed the Courthouse. He was jailed for contempt but later released in custody of his relatives. This was also the week when a disturbed woman was led away from trying to get into the courtroom with a 'message from God.' It was the week when a Cleveland man was jailed for mailing cryptic letters to jurors, and when Rabbi Rudolph Rosenthal devoted his Friday night sermon at Temple-on-the-Heights to the trial and its coverage.

Rabbi Rosenthal denounced the 'vast amount of space, utterly disproportionate, that trails through the pages of our dailies, sensational materials hardly calculated to teach a higher appreciation of fellow human beings.' He likened the papers' handling of the trial to a 'Roman circus.' Concluding on an optimistic note, he remarked, 'It is our hope that the newspapers will prove to be their own best censors.'

As the rabbi found out, self-censorship in Cleveland would just have to wait till the Sheppard trial was over."

THE TOLEDO BLADE.

The *Toledo Blade*, Wednesday, December 22nd, in an editorial entitled "Free Press and Fair Trial":

"At this distance, some 100 miles from Cleveland, it looks to us as though the Sheppard murder case was sensationalized to the point at which the press must ask itself if its freedom, carried to excess, doesn't interfere with the conduct of fair trials.

The hue and cry raised in Cleveland newspapers after Marilyn Sheppard was found murdered could not help but inflame public opinion even as it pointed the finger of suspicion. One of the papers, which virtually demanded the arrest of Dr. Sheppard, almost had a vested interest in his conviction.

During the long-drawn-out trial the Cleveland papers and a good many others treated it like a Roman holiday. With a man's life at stake, they competed with one another in whipping the evidence up into one sensation after another. Skeletonized summations of lengthy testimony came pretty close to drawing conclusions from it.

Day after day the public, and the jurors, were treated to opinion-shaping headlines, such as:

Quit Stalling and Bring Him In
Sam Declined July 4 Lie Test
Says Dr. Sam Talked Divorce
Testifies Sam Changed Stories
Charges Sam Faked Injuries
Says Marilyn Called Sam a 'Jekyll-Hyde.'

In either event, there was considerable criticism of the way this story was handled which came not alone from judges and lawyers but also from the public. And we think that it is justified, because we do not believe that the rights of a free press are paramount to that of a fair trial.

After all, a fair trial, involving the age-old struggle of the individual against all-powerful government, is the most basic, the most essential of all human rights.

From the dawn of civilization mankind has looked to it as the first line of defense against oppression under any form of government. Before the other powers of kings and tyrants were questioned, the

right of courts to do justice between them and their subjects was demanded and sometimes accepted.

In modern times even dictatorships, of the man on horseback or of a collectivized people, have at least pretended to keep their hands off the courts so that they could at least appear to hand down judgments according to the law and the evidence.

And should American newspapers do less today?

The freedom of the press, gained in the last century or so as the democratic concept evolved, is not an absolute. It is much more like a sociai tool to be used wisely and responsibly for the public good. And newspapers employ it to their peril when they interpose themselves between the people and their courts and undertake to try cases in print before, or as, the evidence is presented to the jury."

THE DEKALB NEW ERIE.

The *DeKalb, New Erie,* Dekalb, North Carolina, Thursday, November 4, 1954:

"Regardless of how the Samuel Sheppard murder trial in Cleveland comes out, one thing is certain. The public is being fed in dime novel fashion the minute details and in language that would do justice to the coronation of a king.

Another thing is as certain also. By the time the trial is completed, it will not make too much difference to Dr. Sheppard's character whether he is declared innocent or guilty. And so for Juror J. R. Manning. His character is being tenderly shredded by the barbed wires of publicity. If he has spent more than a decade in repentance and atonement, those efforts are wasted now.

We do not know whether or not Dr. Sheppard is guilty or innocent. That is not the point. What is of

far more importance to a far greater number, is it fair and just to make a carnival out of an occasion, when that occasion is a legal effort to ascertain whether or not a man shall die? We believe it is unfair and unjust.

The whole matter touches on a phase of our freedom that is desperately important."

"FAIR TRIAL AND FREE PRESS"

Honorable Florence E. Allen, Judge of the United States Court of Appeals for the Sixth District

American Bar Association Journal, 1955, page 900:

"* * * Canon 35 should be strictly enforced. It should be enforced by the Bar, by the court with the support of the Bar, and by the newspapers themselves. For, as a prominent newspaper recently stated concerning a nationally famous case, the case had been 'sensationalized to the point at which the press must ask itself if its freedom carried to excess doesn't interfere with the conduct of fair trials.'

> After all (said the report), a fair trial, involving the age-old struggle of the individual against all-powerful government, is the most basic, the most essential of all human rights * * * Freedom of the press, gained in the last century or so as the democratic concept involved, is not an absolute * * * And newspapers employ it to their peril when they interpose themselves between the people and their courts and undertake to try cases in print before, or as, the evidence is presented to the jury. We do not believe that the rights of a free press are paramount to the right of a fair trial.

After all, our liberty is based not only on freedom of the press, vital as that is. It also is based upon freedom of the individual. Freedom from conviction on hearsay testi-

mony, freedom from conviction following upon years of confinement without the issuance of any charge, both of these freedoms are essential. Without them our wealth, our material power, our mass production, will eventually come to nothing. With both of them, America truly is, as Lincoln said, 'the last best hope of earth.' ''

CONNECTICUT BAR JOURNAL.

Volume 29, March, 1955.

Article by Herbert Brucker, Editor of the Hartford Courant.

Page 47:

"In the same way we heard much recently as to what a horrible example the Sheppard case was of trial by newspaper. Now there were undoubtedly departures from the highest standards in those proceedings. And lawyers should be interested to note that ten of fourteen newspaper editors, in a panel from the American Society of Newspaper Editors, felt that the Sheppard case was the most overplayed story of 1954. At the same time, it seems fair to ask lawyers also to note that, when the defense in the Sheppard trial sought retrial, the judge ruled that newspaper publicity had not influenced the jury's verdict. Maybe he wasn't the most objective of oracles, but that's what the man said."

"THE PRESS VS. THE COURTS"

John M. Harrison, Associate Editor of the Toledo Blade.

The Saturday Review, October 15, 1955.

"The savage slaying of Marilyn Sheppard, wife of Dr. Samuel Sheppard, sometime in the early morning hours of July 4, 1954, was bound to stir public feeling. It didn't require newspaper stimulation. As the case developed, it was a classic murder story—compounded of all the ele-

ments of fictional and historic crime. Tremendous emotional impact, pathos, and suspense were inherent in the events about which the trial centered.

But these weren't enough for the Cleveland newspapers. Almost from the moment Marilyn Sheppard's body was found, the press took over the roles of detective, sheriff, prosecutor, judge, and jury. One newspaper—in a front-page editorial headlined QUIT STALLING AND BRING HIM IN—demanded the arrest of Dr. Sam Sheppard in language that could only create a strong supposition of his guilt in the minds of the readers. Throughout the pre-trial stages, highly prejudicial material appeared in what were represented as news accounts of the developments. The orthopedic collar Dr. Sheppard wore—supposedly because of injuries inflicted by his wife's killer—was caricatured in cartoons. Simulations of the collar became part of the play equipment of Cleveland children who engaged in games of 'murder.'

Once the trial began, all three Cleveland newspapers offered extensive daily summaries of testimony from which their repeatedly drew their own conclusions, either directly or by adroit manipulation of headlines. The press never left any doubt of the verdict it expected, not surprisingly in view of having plunged so deep into the processes of administering justice by its own rules.

The question of Dr. Sheppard's guilt or innocence still is before the courts. Those who have examined the trial record carefully are divided as to the propriety of the verdict. But almost everyone who watched the performance of the Cleveland press agrees that a fair hearing for the defendant, in that area, would be a modern miracle. Which underlines the question whether there must be some limitations on the freedom of the press in order to insure a fair trial—a historic right men have demanded and defended since before Magna Charta."

"THE PHOTOGRAPHER'S DAY IN COURT"

Glenn R. Winters, Editor, Journal of the American Judicature Society, October-December, 1955.

"LOTS OF WATER has gone over the dam, ink over the presses, and developer fluid down the drain, since the American Judicature Society's two luncheon programs on courtroom publicity were presented in Atlanta and Portland in the spring of 1954. Dozens of similar public discussions have been staged by bar associations and other organizations, and a joint committee of representatives of the American Bar Association and the various media of communication has been appointed and held a meeting in Washington to set up plans for a study of Canon 35.

Meanwhile, as though to provide an up-to-the-minute case in point, the Sheppard murder trial in Cleveland came along to go down in history with other celebrated examples of "trial by newspaper." Here are some headlines that sold Cleveland newspapers in the autumn months of 1954:

QUIT STALLING AND BRING HIM IN
SOMEBODY'S GETTING AWAY WITH MURDER
SAM DECLINED JULY 4 LIE TEST
SAYS DR. SAM TALKED DIVORCE
TESTIFIES SAM CHANGED STORIES
CHARGES SAM FAKED INJURIES

The editor of the Providence Journal and Evening Bulletin declared that "if the newspapers of America had set out deliberately to prove the proposition that abuse of press freedom can wreck the impartial administration of justice, they could not have done a better job than in their reporting of the Sheppard trial."

[redacted]

DEFENDANT'S EXHIBIT KK.

s. 146

[redacted]

DEFENDANT'S EXHIBIT 7.

[redacted]

DEFENDANT'S EXHIBIT RR.

[redacted]

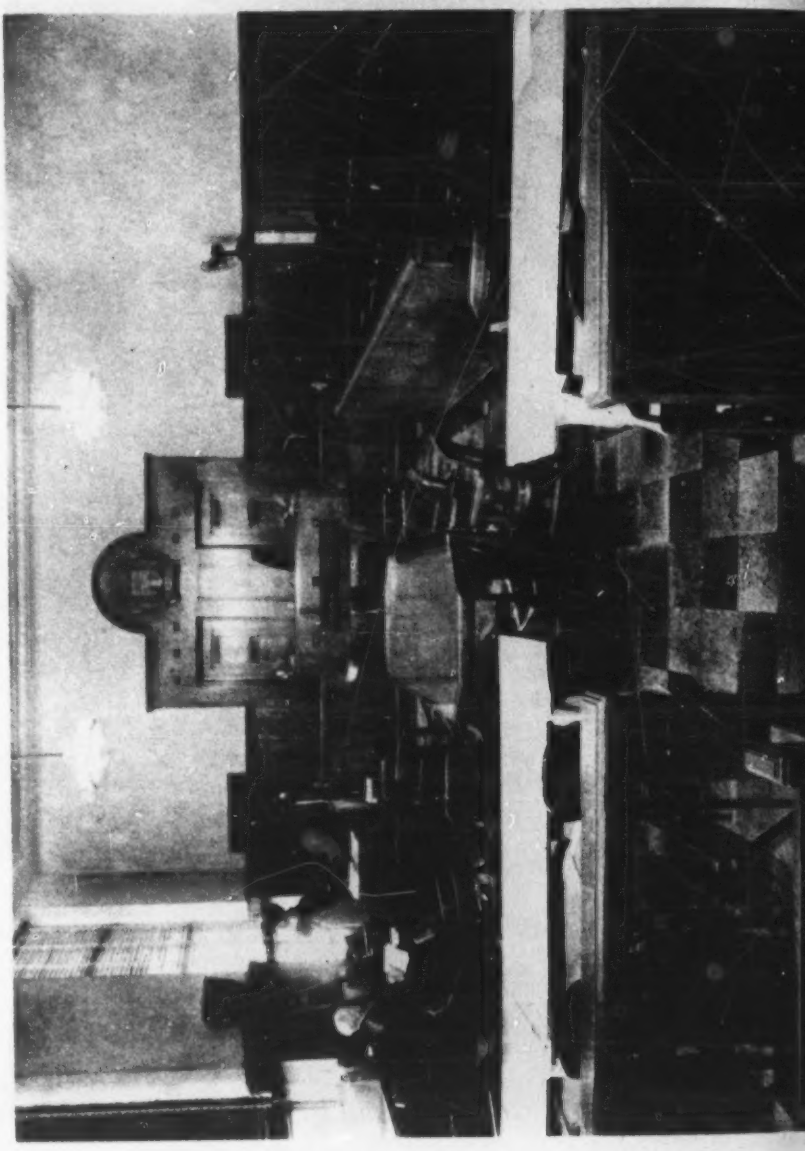
DEFENDANT'S EXHIBIT PP.

[redacted]

DEFENDANT'S EXHIBIT HH.

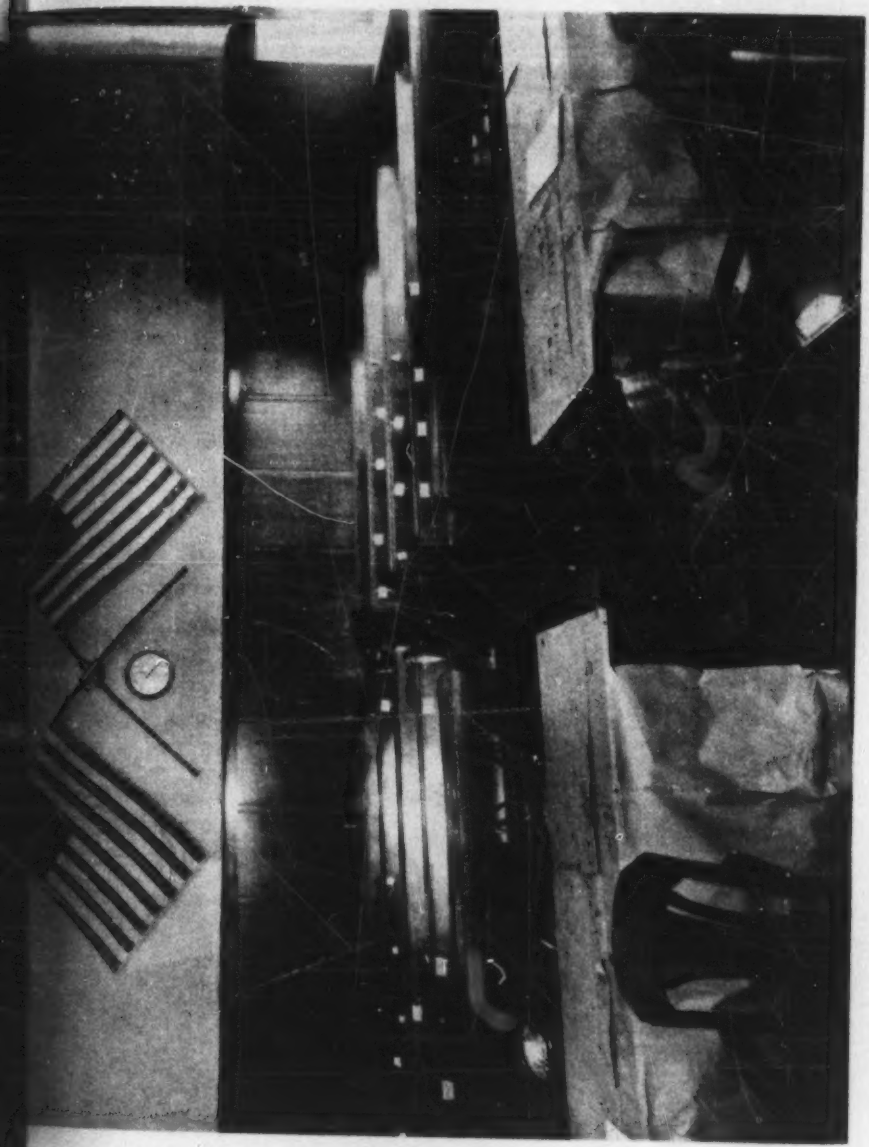
[redacted]

DEFENDANT'S EXHIBIT 74.



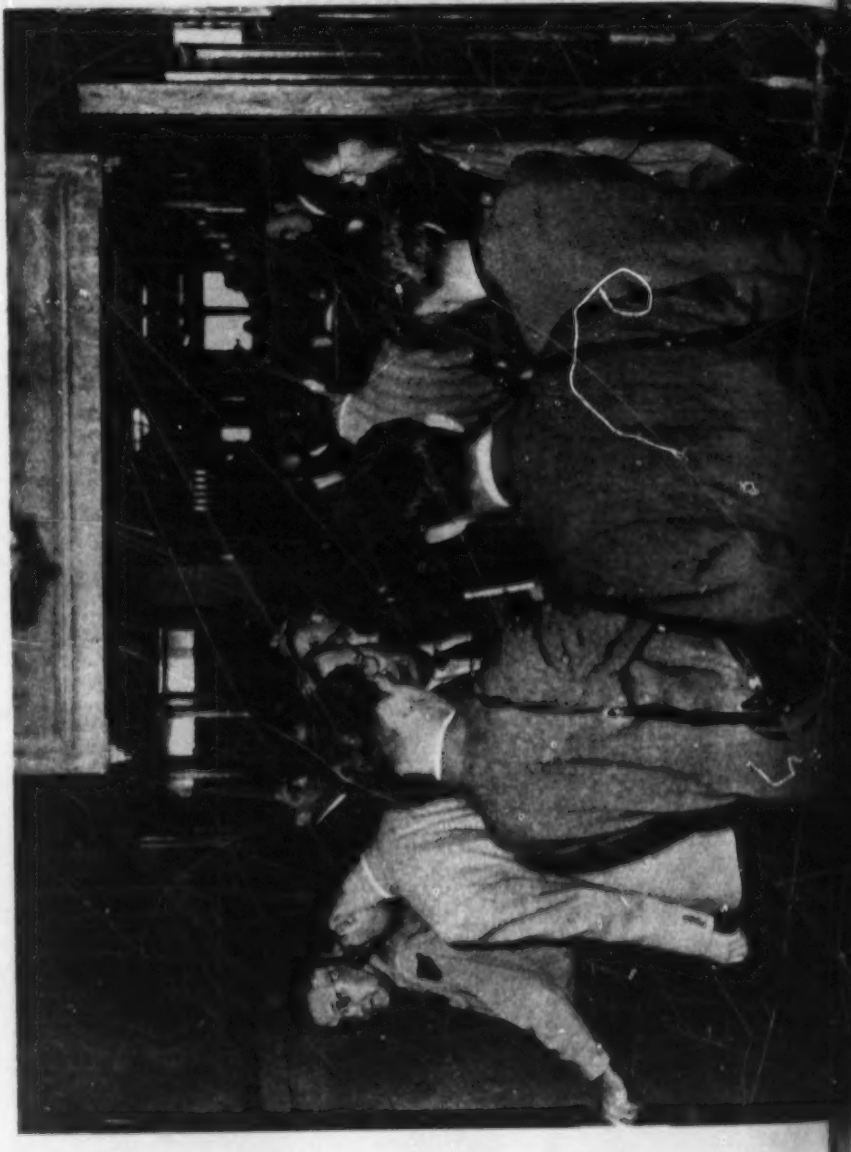
[redacted]

DEFENDANT'S EXHIBIT 69.



[redacted]

DEFENDANT'S EXHIBIT 75.



[redacted]

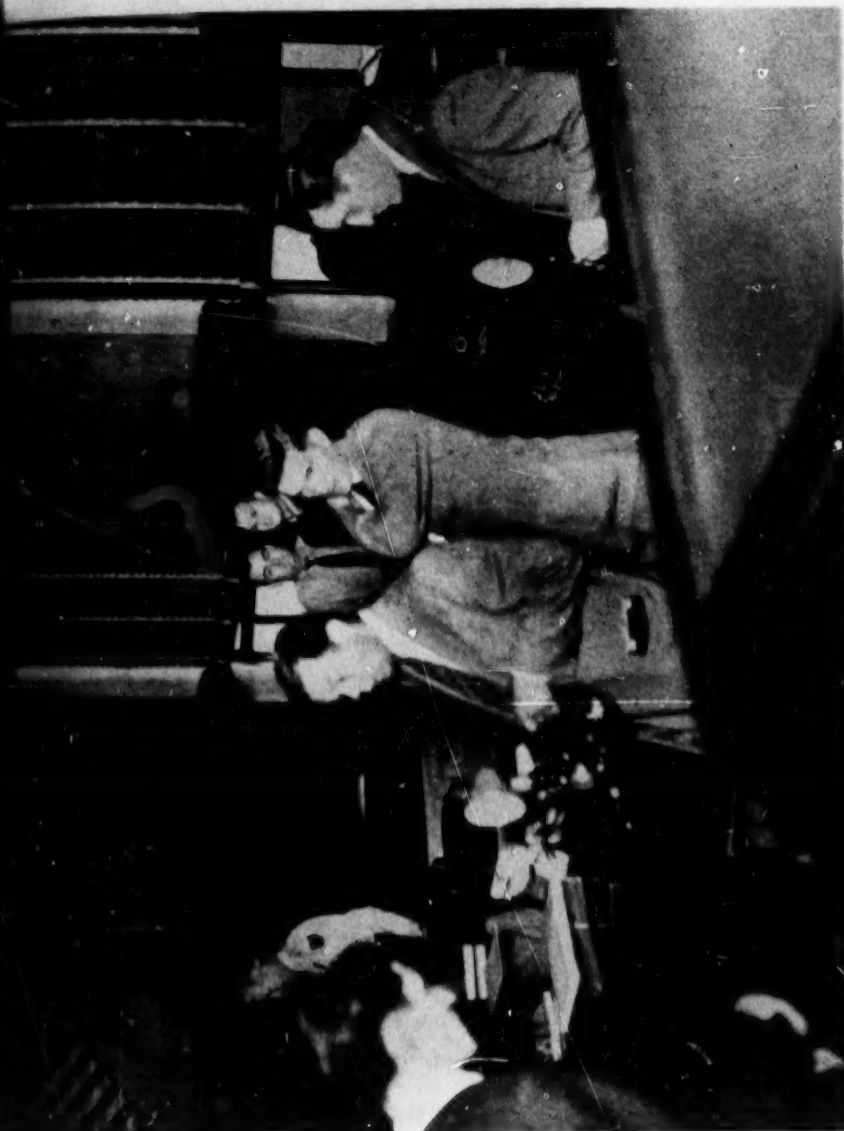
DEFENDANT'S EXHIBIT 72.

[redacted]

DEFENDANT'S EXHIBIT 71.

[redacted]

DEFENDANT'S EXHIBIT 76.



s. 156

[redacted]

DEFENDANT'S EXHIBIT 73.

DEFENDANT'S EXHIBIT 13.

On Monday, August 23rd, Defendant's Exhibit 13 was served on Chief Eaton. The exhibit is as follows:

"Mr. John Eaton,
Chief of Police,
Bay Village, Ohio.

Dear Sir:

As you are well aware, my wife, Marilyn, was murdered July 4th, 1954. Since that time my home and the grounds surrounding it and all my personal property has been in the possession of the police.

I have not been back to my home, except when accompanied by police officers. Both myself and my son have been deprived since July 4th of the possession of my home.

No permission was given by me to anyone to take over this control.

I did not interfere with your possession in any way, or attempt to gain possession of my home, or protest about the action, because I desired to give the authorities every opportunity to make a complete examination of my home, its contents, and the premises surrounding it, in the hope they could discover some clue that would lead to the murderer of my wife.

At the present time, as you know, I am in the County Jail, accused of being my wife's murderer. This accusation is absolutely false. I am informed that certain furniture and other personal property have been moved from my home, without my knowledge or consent.

I am also informed that the premises have been roped off, and that my home is now distinguished in

that way from other houses in the neighborhood and has become the subject of curiosity, and that thousands have stopped and stared at my home.

My child's personal belongings are in his home, and it now becomes necessary to prepare him for school, and in order to do so, he must have access to his home. You have now been in possession for 50 days, which is ample time to make any necessary inspection. Inasmuch as my imprisonment prevents me from personally looking after my property, I am requesting my attorneys to act for me.

I, therefore, demand that you turn over to my attorneys any keys that you have to my home, and that you give my attorneys a list of all personal property that has been removed during the time that you have been in possession. My attorneys are: Arthur Petersilge, Fred Garmone, and William J. Corrigan.

This demand delivered to you by any one of them shall constitute delivery by myself.

Respectfully yours,
(Signed Sam H. Sheppard)

Service of the foregoing demand acknowledged this 23rd day of August, 1954.

(Signed) John Eaton
Chief of Police
City of Bay Village, Ohio."

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL.

"Now come William J. Corrigan and Fred W. Garmone, Attorneys for Sam H. Sheppard, the defendant, and in support of the Motion for New Trial, being duly sworn, say:

"That the judge in this case several days before the day of trial met with newspaper reporters, newspaper

photographers, television personnel and radio commentators and arranged the courtroom in such a manner that the representatives of the press, radio and television were given preference to the space in the courtroom. He also caused to be built and erected inside the bar a long table, which extended across the courtroom, and approximately twenty newspaper reporters were assigned seats at this table. One end of the table was within three feet of the jury box. Outside the bar there are four rows of benches, which are for the use of the public during trials. Each of these benches will seat about twenty persons. The Court assigned the first three rows to the personnel of the press, radio and television and in advance of the trial caused printed slips to be made with the names of such personnel printed thereon, and said printed slips were pasted at regular intervals along said row of benches so that said personnel referred to would know which place was assigned to him or her. The last row was reserved for members of the defendant's family and members of the family of the deceased Marilyn Sheppard. The Court established a rule that the admission of other persons to the courtroom was to be by card. The Court also assigned to said newspaper, radio and television personnel all the rooms on the courthouse floor, including the Assignment Room, where cases are assigned, to other courtrooms for trial. In these rooms said radio, television and newspaper personnel had private telephone lines installed and other necessary equipment to carry on their work. Space in the Assignment Room was set over for the Chicago Tribune, Chicago Sun, the New York Herald Tribune, the Akron Beacon Journal, The New York Journal American, the Associated Press, The Pittsburgh Post Dispatch, The New York Post, The New York Daily News, The International News Service and the United Press.

"There was also erected in that room special telephone

booths and telegraph equipment, which was used to forward with dispatch the reports of the trial.

"Rooms were also assigned to radio commentators on the third floor of the Courthouse. This is the floor on which the jury deliberating rooms are located. One such room located next door to the jury that was impanelled in this case was used by Radio Station WSRS and broadcasting continued from that room throughout the trial and during the time that the jury was in the room next door, and during recess, and during the deliberation of the jury.

"During the entire time of the trial a great number of photographers, both television and newspaper, stood on the steps of the courthouse, on the stairs that lead from the ground floor of the courthouse to the second floor and along the corridor on the second floor from the top of the stairs to the entrance of the courtroom. When the members of the jury came to court, when they arrived for lunch or retired at the end of the trial day, they passed along the way above outlined and were photographed and televised many times, all with the knowledge of the Court.

"On a number of occasions it was necessary for counsel to confer privately with the Court in chambers on points that were in issue in the trial. On such occasions when said conferences were held behind the closed door of the Judge's chambers, there would be a great rush of photographers, reporters, radio and television personnel into the room which adjoined the Judge's chambers. So great was the number that crowded into the room that it was necessary on such occasions for counsel to push their way out so that they could again regain their places in the courtroom. After counsel had secured their exit, then the great number of such persons as described would crowd into the Judge's chamber to inquire as to the purpose of the meeting.

"Each morning the defendant was brought into the courtroom approximately ten minutes before trial opened, at which time he was surrounded by photographers and television operators and was photographed and televised many times.

"Many times during the trial there was constant movement in the part of the courtroom occupied by said reporters, radio and television personnel. They kept going in and out and changing places and relieving one another.

"Pictures of the jurors were printed in the newspapers and were shown on television in the evening. Newspaper pictures were taken in the home of one juror by a Cleveland Press photographer and printed in that paper along with an account of how the juror's family fared while the juror was in court. The fact was called to the attention of the Court, but no action was taken.

"The Court permitted photographers to come into the courtroom and take pictures of the jury panel. The Court permitted photographers to go into the jury room and take individual pictures of the members of the jury. These pictures were printed in the newspapers.

"Television cameras were set up inside the courthouse with the knowledge and consent of the Court. During the trial the Court was part of a television program that took place on the steps of the courthouse in the morning at a time when the jurors were arriving. This program was arranged by a reporter named Fabian, a representative of the Scripps-Howard newspapers. The Court stood across the street and watched until he received a signal and then walked over to the courthouse steps, mounted the steps and had a conversation with said Fabian while the television cameras operated.

"On one day while the jury was leaving the courthouse, a man appeared on the Courthouse steps, carrying a sign referring to the case of Sam H. Sheppard. Counsel for the

defendant took this man and the sign before the Court and requested that he be charged with contempt. Several days later when counsel was not present, this person was released.

"For months prior to the trial news in the Cleveland newspapers were slanted against the defendant. A front page editorial appeared in the Cleveland Press demanding his arrest and urged he be subjected to the third degree. Day after day the public and jurors were treated to opinion-shaping headlines such as, *"Quit Stalling and Bring Him in"—"Sam Declined July 4 Lie Test"—"Says Dr. Sam Talked Divorce"—"Testifies Sam Changed Stories"—"Charges Sam Faked Injuries"—"Says Marilyn Called Sam A Jekyll-Hyde."*

"Statements were made by the Chief of Police, Inspector of Detectives, Head of the Homicide Squad, members of the Prosecuting Attorney's office, which were adverse and condemnatory of the defendant. Affiant says that none of said persons testified in the case.

"The defendant in his testimony stated facts bearing upon his questioning by Cleveland detectives. That evening the following headline appeared in the Cleveland News:—"Kerr calls Dr. Sam a bare faced liar." The "Kerr" referred to is Captain David Kerr, Head of the Cleveland Homicide Squad. Again, affiant says that said Kerr did not testify in the case.

"The jurors in their voir dire examination testified they read Cleveland newspapers and most of them had a Cleveland newspaper delivered into their homes.

"The jurors received the case at 10:30 A.M., Friday, December 17, and deliberated until 4:30 Tuesday, December 21st. This included deliberations on Sunday, December 19th, from approximately 10:30 A.M. to 6:00 P.M.

"During the deliberations the jury was ordered sequestered and placed in the charge of two male officers of the

court. During the period of deliberation the jurors were taken by the officers to their meals and at night were lodged in the Carter Hotel. During the time the jury was allowed to separate and no female officer of the court was appointed to supervise the female members of the jury.

"On one occasion the jury was separated and photographs taken of such separated groups. One photograph was taken of the women members of the jury in one group and another photograph showed the male members of the jury in another group. The photographs of the groups as separated were printed in the newspapers. Affiants say that in order to arrange such groupings, communications were made with the jury. Other photographs were taken of the jury while at their meals, coming to the courthouse

"Affiants further say that during the five days of deliberation and during deliberations, the jury was in a room that was up one flight of about twenty stairs from the courtroom; that the door from the courtroom to this flight of stairs was generally open; that during the deliberations the courtroom and the corridor outside was filled with curious onlookers, reporters, television, radio commentators and photographers. During this time card games were in progress in the courtroom, groups were visiting, a great number of people milled inside and outside of the courtroom, and the courtroom and corridors resounded with laughter, loud talk and noises. The floors of the courtroom and corridor became stained and dirty, and strewn about were papers, cigarette butts, empty paper cups and various litter; that the atmosphere that existed during the trial and during the deliberation of the jury was not conducive to profound and undisturbed deliberations.

"In support of this Motion, affiants attach hereto a Transcript taken on the hearing for bail, which is marked 'Exhibit 1,' and clippings from the Cleveland newspapers,

marked 'Exhibit 2,' and said exhibits are made a part hereof as though fully set forth herein."

BILL OF EXCEPTIONS—BAIL HEARING, EXHIBIT 3 ON MOTION FOR NEW TRIAL.

"Q. Mr. Winston, when you returned the indictment you made the statement that 'pressure on us has been enormous'?

A. That was part of the statement I made.

Q. Did you make that statement? (R. 69. Bail Hearing.)

A. Yes.

Q. What was the pressure that was placed on you?

A. Only curious people who wanted to know what we knew on the Grand Jury.

Q. Who were the curious people, and where did you talk to them?

A. I cannot name them; they are myriad.

Q. Where did they talk to you?

A. On the street, on the phone, in clubs that I belong to.

Q. Were you called at your office?

A. Yes.

Q. Were you called at your home?

A. Yes.

Q. When you said 'pressure on us was enormous,' when you made that statement, you were referring, of course, to the Grand Jury, weren't you?

A. Yes.

Q. And you knew that the kind of pressure that was placed on you had been placed on other members of the Grand Jury, hadn't you?

A. Yes."

Argument by counsel for the State of Ohio in opposition to defense motions for directed verdicts for acquittal (Tr. 4983-5008)

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

* * *

[4983] Mr. Mahon: If your Honor please, the State is well aware of the fact that it is the State's burden to prove its case beyond a reasonable doubt. The State is well aware of the fact that it is the obligation on the part of the State to prove all of the elements that go to make up the crime of murder in the first degree or the crime of murder in the second degree or a manslaughter finding.

There have been motions made here, your Honor, by the defense for the Court to dismiss the indictment or, in the alternative, to instruct the jury to find the defendant not guilty on the charge of murder in the first degree. There was also a motion that the Court dismiss this matter or instruct the jury as to second degree murder. Also a motion for the Court to direct as to a charge of manslaughter here, and also a motion to direct on assault and battery, and number six, on assault.

Now, as to the last two, assault and assault and battery, I don't think they have any part—should have any part in this [4984] discussion, because certainly if there was an assault and battery upon the victim here by this defendant, and that assault and battery resulted in her death, then it would be manslaughter. You don't have any assault and battery in this case, you couldn't have.

The Court: You can disregard those, Mr. Mahon. The Court will not charge on assault and battery, in any event.

Mr. Mahon: Now, on a first degree murder case, it is necessary that the State prove that the defendant unlawfully—or produce some evidence at this time that he unlaw-

fully and purposely and of deliberate and premeditated malice took the life of Marilyn Sheppard.

Now, how do you prove those elements? You can prove them by direct evidence; you can prove them by circumstantial evidence; you can prove premeditation by what a persons says or what a person does and how they do it. You can prove purpose to kill or intention to kill, they are the same, by the acts of the person, by the weapon that is used in the killing, and you can infer malice from the overall picture [4985] as it exists.

Now, what have we here? We have a woman who was killed. She is seen on the morning of July 4th lying in her bed covered with blood, the bed is soaked with blood, her blood. There are many wounds upon her head and upon her hands and face, 35 separate wounds on that woman. Whether some of them might have been done at one time, that is, might have been more than one injury sustained at a blow makes no difference. There were 35 wounds. There were wounds on the face, the head, on the hands, the back part of the hands. And it is easy to infer as to how the blows came—the wounds came to be on the hands. The impulsive throwing up of the hands to protect her face from these deadly blows that were being rained on her, and that is how the wounds got on the back of the hands.

Fingernail on one hand pretty near torn off. Whoever committed that type of a crime certainly had malice in their heart, had that depraved, wicked mind that you talk about, sir, to commit those kind of acts upon any human being. [4986] Is that any evidence of a purpose to kill or an intent to kill, if your Honor please? The instrument that was used, certainly a deadly instrument that fractured the skull, why, the frontal part of her forehead, Mr. Corrigan—you saw the photographs, looks like a checkerboard, and the skin was peeled back and photographs taken, it looks like a checkerboard.

Oh, and they say, "No, that isn't what she died from. She died from strangulation because blood got down into her lungs."

Well, where did the blood come from but from the wounds that was in the head? You say that that wasn't the proximate cause of her death.

Can you infer purpose to kill, if your Honor please, from those acts? Is there evidence that there was premeditation, if your Honor please? Whoever killed that woman with whatever instrument was used in accomplishing the thing that was done there was carried into that room. And why would someone carry a deadly weapon into a room if they didn't have something in their mind as to what they were going to use [4987] it for, and did use it for, if your Honor please?

And after that beating the weapon was taken from the room. Is that any evidence of premeditation, if your Honor please? Is there evidence of purpose to kill? Is there evidence of malice? Can't you readily draw those inferences right from the silent facts as they exist?

The lady who—the maid there said there was nothing missing from that room. The weapon that killed that woman, the weapon that killed that woman was taken from that room, and if there was nothing missing from the room, that is, the regular things that are in the room, then the weapon must have been carried into the room and used. And even the defendant himself, on the 9th day of July when he visited the house in the company of his lawyers and the deputy sheriff, said there was nothing missing that he could see. Now, is that evidence, some evidence—and there only has to be some substantial evidence—at this point we are not required that our case be proven beyond a reasonable doubt, but just that there is some [4988] substantial evidence for the jury to consider in this case.

Now, what have we here to tie up this defendant, Sam

Sheppard, with the commission of this crime? Have we some evidence, some substantial evidence for the jury to consider in that respect? I am not going to go over all the evidence, your Honor, but we do have the evidence of Don Ahern and his wife, Nancy, who visited Mr. and Mrs. Sheppard on the night of the 3rd of July at their home, and they had dinner there. And the Aherns left there at 12:30 a.m., right after midnight, the morning of July 4th. That's when they left.

Mrs. Ahern had locked the door leading out onto the porch, she had locked that door, put the chain on after they had cleared the table where they ate out on the porch. And when they left, Mrs. Sheppard went to the door leading out to the road, accompanied them to the door, bade them goodnight. When they left, Sam Sheppard was in the living room on a couch. He had on his trousers and shoes, he had on a white T-shirt and he had on a corduroy jacket as he lay there on the couch, and had on his [4989] wrist watch.

The Aherns left. When they left there was living in that house Marilyn Sheppard, Sam Sheppard and the son, Chip, who had been put to bed about ten o'clock at night.

In the morning Mayor Houk received a telephone call to come over, something had happened to Marilyn, and when he arrived there he and his wife—and that was about 10 minutes to six that that call came to him—when he arrived there, his wife went upstairs and found Marilyn lying in a pool of blood on her bed dead, horribly beaten. Sam Sheppard was in the study, or den, as they call it, sitting on the chair, slouched over on the chair. And then he told the story of some person being in there that night, and told this story of his hearing Marilyn call or scream or moan, in other words, some noise aroused him from his sleep as he slept there on the couch, and that he went upstairs and as he got upstairs—and he told a couple of versions of

this—some said that as he got up at the head of the stairs he was clobbered, and the story he told others was he went into the bedroom and there was a form in [4990] there and he was struck, and the next thing that he knew he came to and he saw something shiny on the floor, and it was a badge that he had in his billfold and his billfold was lying on the floor.

And then he heard a noise downstairs, and he went downstairs, through the living room and out on the back porch, or just leaving the back porch at the screen door—or the front door, it would be, he saw a form; and he chased that form down the steps down to the beach, and there grappled with that form. And he was knocked out again and came to with his legs stretched out in the water and lying on his face, and his body being wallowed back and forth by the waves, and that he then came up and went up to Marilyn's room and there took her pulse, and then later on called Mayor Houk. That's the story that he told the people.

Then when the authorities arrived there, what did they find? They find that the desk in the den there, all of the drawers are taken out of the desk and they are lying on the floor there. The contents are not out, but the drawers [4991] are lying on the floor. Marilyn's watch is lying on that floor in the den, also. And out in the living room, that desk in that room, it is open, the top of it is open, the drawers are pulled out, three or four of them are pulled out. The contents are not disturbed in the drawers and some of them—they are filled up, they are not disturbed. The photographs show they are full right up to the top, nothing disturbed in them, but there is a bundle of papers on the floor in front of this desk, a bundle of papers right there on the floor. At first hand, you would think that somebody had burglarized the place, and that was the intent, to have people believe that. Nothing was missing except the watch of Sam Sheppard, a key ring that he had—

or a chain, key chain with some keys on it and a ring belonging to him. Those are the articles that are missing.

And in the early afternoon of that same day was found on the bank, or over the bank in the shrubbery, in the weeds back of the house down towards the lake, in a little green bag was the watch of Sam Sheppard, this key chain [4992] and the ring. The watch had blood on it. Those articles were taken to the hospital where Sam Sheppard was, and he identified those articles and identified this green bag as being a bag that he had in his desk or had had in his desk in which he had tools for his outboard motor.

Later on it was analyzed—and by the way, that watch when it was found showed quarter after four, and it was stopped at quarter after four, and it was after one o'clock when they found it, but that is the time that was on it, and it started up later on in the day, started running again.

The blood on that watch was analyzed, and it was found to be human blood, and it couldn't be definitely determined as to its type, but it was definitely determined that there was an M factor there and that Marilyn's blood had an M factor. And in the study or den, there on the floor was found Marilyn's wrist watch and that had blood on it, and that was analyzed and found to be human blood with an M factor, one of the factors that Marilyn had in her blood. [4993] And it is interesting, if your Honor please, as to the watch of Marilyn Sheppard, and I will come to that in a few minutes, but first I want to talk about this green bag. While there was blood on the watch belonging to Sam Sheppard that was in that bag, there was no blood on that bag, that cloth bag, there was no blood, which can only mean one thing, if your Honor please: That the blood was dry on that watch when it was placed in that bag.

Now, let's take Marilyn's watch that she had been wearing. There are photographs here in the evidence in this case that show the wrist of Marilyn with blood marks

around her wrist, with the indentations of the band of her wrist watch, which means just this, your Honor: That that watch was on her long enough after that blood got on there to dry before the watch was taken off.

And then we have also found in that bedroom the pillow, and on that pillow, which was separated entirely from the blood portion on the bed, on that pillow are blood marks which distinctly show that there was some instrument that was lying on [4994] that pillow that was soaked with blood, because the imprint, the imprint of what Dr. Gerber calls a surgical instrument but which he says might be some other instrument of a similar shape, but that is clearly impressed on that pillow in blood, if your Honor please.

And that is of what significance, if your Honor please? It means that that death weapon, after it was used to pound the life out of that woman, must have been laid down on that pillow and remained there long enough for the blood to dry before it was removed. There can't be any question about that, if your Honor please.

[4995] Now, what does that mean in this case in the circumstantial factors in this case, if your Honor please? There was not an abrasion on Sam Sheppard with the injuries that he had. He had a bruise on the side of his face. He had a black eye, claimed he had an injury to his neck. There was no evidence of any abrasion or bruise there, according to Dr. Hexter, when he examined him that day, and this defendant tells you—he told the police when they did question him, told the Coroner when he questioned him at the inquest, that he had been clobbered. I believe he told one of them he thought with a fist in the back of the neck.

Can you conceive of a story of that kind in this case, if your Honor please, under these circumstances, that if there was another man there who had committed that crime of killing that woman, that Sam Sheppard, the only person who could possibly identify the murderer, would have been

let go with a clobbering in the back of his neck? That this person who was in that room with a weapon raining blows, death blows down on his wife, would not use the same instrument on him when he came up there in response to her cry for help [4996] on that morning?

No, he didn't show any evidence of being hit with a deadly instrument of any kind. And then when he heard a noise and he went downstairs and followed this form down on the beach and was knocked out again, there are no marks to show any blows, no marks at all outside of the black eye, no abrasions, and he is wallowing in the water with his face down, he told the authorities, and his body being wallowed back and forth by the waves.

Mrs. Houk testified that when she retired at 3 o'clock that morning, at 3 o'clock that morning when she retired—there is a concrete abutment in the rear of her house there on the lake, and the waves were pounding against that, she said, at that time, 3 o'clock that morning.

The fishermen down on the pier said that they had to leave there about 1:30 in the morning because the waves were coming over the pier.

Why, if this defendant was down in that lake as he told the police that he was, why, he would be drowned. The water would have been all over him.

And as he told Dr. Gerber when he testified at [4997] the Coroner's inquest, he couldn't identify the form, give any description of it, couldn't tell whether it was a man or a woman, a beast or a human being. He said he thought it had a hat on, and if it had a hat on, how could he tell it was a bushy-haired person. A phantom is what he was chasing, a phantom is what he was chasing.

I don't have any doubt but what he ran down on the beach and got in the water.

Oh, then, something is said that there is no evidence here—why, if he had been up there and had killed his wife,

he would be covered with blood. Why, his shoes would have had it on and his belt, yes, and his shirt, too, would have had it on. His shirt would have had it on, too. That T-shirt would have had it on. We know he wasn't wearing the jacket upstairs at that time because the jacket was neatly folded lying down on that couch downstairs. This man that rushes upstairs to help his wife stopped long enough to neatly fold the jacket and lay it down on that couch, and then go upstairs.

That shirt would have been covered with blood. The shoes not necessarily, because the [4998] person who had clobbered that woman would have been up close to the bed pounding her, and the blood wouldn't have gone down on his shoes that were alongside the bed, but the shirt, yes, it would have been covered, and that is why it is missing, that is why it is missing, because it was covered with blood.

Sure the walls were covered with blood. Every blow that was rained splattered blood, human blood out.

Is that sufficient evidence, if your Honor please, for this matter—this case to be submitted to the jury? These circumstances that we have here of this defendant's presence in that house, no property taken—no property taken—is this a burglary? No property taken, nothing disturbed outside of some drawers being pulled out. Why, they went to the extent of dumping some tools out of that green bag, to do what? To put a wrist watch, a ring and a key chain into it. Why, you could have put all of it in the watch pocket of your trousers. Why, it wasn't a handful, even, and they went to the extent of getting a bag and putting it in, and then this supposed burglar did [4999] what with this property? Why, he went outside 20 feet away from the house and threw it in the weeds, threw it in the weeds. Is that the act of a burglar, if your Honor please, or does that set up the act of a person who is trying to conceal and to deceive people because of the terrible act that he com-

mitted there himself? That is what we have in this case, if your Honor please.

It seems to me that when you consider all of the factors here, without going over all of the blood that was found in the house here—and they say, oh, well, that is nothing to that. The dog was the one that caused all that blood around there but, of course, there were some positive tests here that were made by some competent people who found that there was some of that blood, that where there was sufficient quantity to analyze, that in a precipitant test it showed that it was human blood, human blood, and some of that blood was taken from the risers, not on the step where a dog might drop it, but from the risers. Certainly the dog didn't pass any blood up against the riser, so that it was human blood that was there. A lot of it they couldn't determine whether it was human or animal [5000] blood, but there was sufficient quantity to know that someone went down those stairs with blood dripping from their hands, or from some instrument that they were carrying. There can't be any question about that, your Honor please.

Now, is that sufficient for a jury to draw reasonable inferences from to determine whether or not this defendant has been proven guilty beyond a reasonable doubt? It seems to me that the evidence here, while mostly circumstantial, if your Honor please, pretty near all of it circumstantial except the fact, the cold fact that the woman was cold beyond any doubt, and that is direct. There isn't any doubt. She certainly didn't commit suicide. She was killed at the hands of someone. That is direct, but most of the rest of it is circumstantial.

Why, when the police—they tried to shoo off this thing about attempting to cover this man up. Why, you remember Carl Rossbach. He didn't go there on the 4th of July. He didn't go there until the 5th, and he went to the hospital the 5th and wasn't permitted to talk to Sam

Sheppard by Steve and by Mr. Corrigan himself, who was there. He wasn't permitted. On the 6th he was not permitted [5001] to talk. On the 7th, he went there and was not permitted to talk. On the 8th he went there, and after quite a lot of trouble, quite a lot of trouble at the hospital there, was finally permitted to talk to the defendant in the hospital there. Oh, no, there wasn't any cover-up, there wasn't any trying to conceal this man at all from the authorities.

That evidence is in before your Honor, if your Honor please.

Now, it seems to me that when you consider all of that, that there certainly is plenty of evidence here to be submitted to the jury for them to determine whether or not this defendant is guilty or not guilty of this charge.

The Court: Mr. Mahon, I have one question: What do you say to Mr. Petersilge's statement or claim that all of this, serious as it all is, perhaps, in any view you take of it, could be equally as consistent with the innocence of Sam Sheppard as his guilt?

Mr. Mahon: Well, isn't that a question for the jury to determine, if your Honor please?

The Court: Well, that is a [5002] question that bothers the Court. That is why I put it to Mr. Petersilge. Isn't it perhaps for the jury to determine whether that is so?

Mr. Mahon: It is a question of fact. That is a question for a jury to determine.

The Court: All right. I have got your views.

Have you any more?

Mr. Petersilge: I would like to say just a couple of things very briefly, your Honor.

The Court: Sure.

Mr. Petersilge: Mr. Mahon referred to Dr. Hexter's testimony that there was no evidence of the injury at the back of Sam's neck—

The Court: No evidence of what?

Mr. Petersilge: No evidence of injury at the back of the neck here or the base of the brain.

I want to call your attention to Dr. Hexter's testimony at page 2919 of the record.

He says there, "Q. You say there was no injury to the base of the brain?

"A. I didn't say that. I said an injury to the forehead and not to the base of the brain.

[5003] "Q. I am asking you the question: Do you say there was no injury to the base of the brain?

"A. I don't mean it that way, Mr. Corrigan.

"Q. Well, will you answer the question? Was there or was there not an injury to the base of the brain?

"A. That is a question I can't answer because I only saw Sam once.

"Q. You don't know, then, is that your answer?

"A. No, sir, I don't know."

The Court: The court recalls what his testimony was very well.

Mr. Petersilge: Now, Mr. Mahon also spoke about the T-shirt, that the reason it was missing is because it was soaked in blood.

Well, your Honor, whether the blood would have been below the knee or not may have been a question where the man was standing, but there is no question about it that the blood would have been above the—would have been on the trousers above the knee, and those trousers show definitely that there was no blood spot sufficient as would have come from the spraying of the blood that was caused by the blows.

[5004] Now, Mr. Mahon had nothing to say about that.

So far as the blood on Sam's watch, and the blood on Marilyn's watch being dry, there is no evidence in the

record as to how long it takes blood to dry, but in the absence of such evidence, the jury can't be allowed to speculate—

The Court: Oh, I think that Dr. Gerber—

Mr. Mahon: There is evidence. Dr. Gerber testified to that.

The Court: That it dried very rapidly when it is exposed to air.

Mr. Mahon: From five to twenty minutes is the testimony.

The Court: There was an element of time testified to.

Mr. Petersilge: Yes. I think it depends on how thick the layer of blood was and what the conditions were.

The Court: That is right, and when you expose it to the air, in particular, yes.

Mr. Petersilge: Yes, but the idea that Marilyn—that the picture shows that there was very little blood on her wrist, the idea that her watch might not have been dried within the time [5005] that Sam was struggling with this man, or that the same man who struck him down was taking off Sam's watch and the key chain and ring, that is purely speculative.

The Court: Well, I think Mr. Mahon—I don't think it is worth the time here now. Mr. Mahon merely referred to that fact as some evidence that the blood was dry because the blood did not get onto the bag after its insertion.

Mr. Mahon: No, if your Honor please. As far as her watch is concerned, the blood was dry on her hand with the imprint of the band of the watch on it.

The Court: Oh, yes. That is Marilyn's watch?

Mr. Mahon: That's right.

Mr. Petersilge: Yes.

Mr. Mahon: The imprint is still on there. It must have been on there until it dried.

The Court: Yes, I have got that.

Mr. Petersilge: Yes, your Honor, I intended to refer to that, but meant that it wasn't necessarily a long time that the watch had been there [5006] before it dried sufficiently when that was taken out.

The Court: What he infers is that the entire picture on that issue does disclose that the blood had dried before the watch was removed from the wrist. That was the claim made.

All right. I think we have got that.

Now, 9:15 tomorrow morning. The Court wants to sleep over this matter now. This is not easy, and I hope we will be able, if we decide to go further, to go right ahead at 9:15. The Court may want some little time, he may not, and, of course, if we dispose of it that will end that, and having one or two people here will not be any great inconvenience, so I would like you to be prepared, if we are ready to go, at 9:15 tomorrow morning.

* * *

(Thereupon at 4:40 o'clock p.m. an adjournment was taken to 9:15 o'clock a.m., Thursday, December 2, 1954, at which time the following proceedings were had):

[5007] *Thursday Morning Session, December 2, 1954*

(9:15 o'clock, a.m.)

(Thereupon, the following proceedings were had in the absence of the jury:)

The Court: Gentlemen, due to the tendency that always exists, among the laymen at least, to deem anything that the Court says about the evidence in a case, or about the remarks of counsel directed to that evidence, as some expression or at least suggestion that the Court has formed some opinion as to what the facts really are, of course, this case and in this connection at the moment the Court has no obligation whatever, nor even right, to even consider the

weight of the facts in this case nor to express any opinion or, in fact, have any opinion as to the guilt or innocence of the defendant. And for that reason the Court will not comment whatever upon the motions nor upon the remarks to them, splendid as they were. But the Court feels that at this stage of the record this case is not one that can be disposed of by the Court as a matter of law, and for that [5008] reason the three motions will be separately overruled and exceptions noted to each separately.

I would like to say to counsel that I have here the original report of the autopsy and the copy for introduction. Will you be kind enough to see that the original comes back to me?

(Thereupon, a discussion was had off the record, after which the following proceedings were had:)

The Court: May we agree that the record may be corrected so that it makes no difference which way you construe them, that all motions made on yesterday are separately overruled and exception noted as to each separately?

Mr. Petersilge: I think the motions which Mr. Mahon refers to as numbers 3, 4, 5 and 6 were all comprised within the motion which I stated as motion number 3.

The Court: That was my conception.

Mr. Mahon: Oh, no. They were all separately stated.

The Court: All right.

* * *

THE YEARS WERE GOOD

by Louis B. Seltzer
INTRODUCTION BY BRUCE CATTON
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CHAPTER 26

On the morning of July 4, 1954, Mrs. Mrs. Marilyn Reese Sheppard, a pretty Bay Village housewife, was found bludgeoned to death in her bedroom.

For mystery, for suspense, for painstaking putting together of fragmentary clews by the most scientific methods, the Sheppard murder, which was to become one of the country's most famous in modern times, had within it all of the elements of the classic criminal case.

It had one other element, which set it apart from most murder cases of this type. That was the deliberate effort to prevent the law enforcement authorities from finding the killer. The case became both a murder and, in a very real sense, a roadblock against the law.

At the time Marilyn Reese Sheppard was brutally killed, only two other persons were present in the quiet lakefront home, settled among big trees a comfortable distance away from the roadway. One of these was Dr. Samuel H. Sheppard, her husband, a young, handsome, athletic osteopath, and, the other, the Sheppards' sleeping son Chip, aged six.

Bay Village is a tightly knit community to the west of Cleveland. It is composed largely of young people who either have their own businesses, are fairly well established in the profession, or have a competence. It is a community of beautiful homes, peaceful and quiet, but socially vivacious. Families visit back and forth in the easy, relaxed, and buoyant way common to newly created small communities with a youthful flavor. They are very loyal to one another when any form to trouble occurs.

The family of Dr. Sam Sheppard owned a large osteopathic hospital in the village. His father and brothers operated it, with Sam Sheppard, of course, also on the staff.

It was the Sheppard family's hospital that Dr. Sam was taken by his family immediately after the murder of his wife was reported. The reason given for hospitalizing him was that an intruder—a bushy-haired man, as Dr. Sam described him—had injured his neck in the struggle the Doctor reported had taken place in the house. Thus, the Sheppard family surrounded Dr. Sam.

The investigating authorities were blocked off. The Mayor of Bay Village was J. Spencer Houk, who owned the local butcher shop and was a close friend of Dr. Sam. They visited back and forth; they went on vacations together; they owned a boat together. Mayor Houk rejected the advice of Coroner Sam Gerber and the Cleveland Homicide Squad that Dr. Sam should be arrested.

Dr. Sam was fenced in by his family, his friends, and the public authorities in Bay Village. The protective wall had been put up quickly. It was almost impossible to penetrate it, and then only at the will of those who controlled the encirclement—and on their terms. The purpose seemed obvious—to hold the wall secure around Dr. Sam until public interest subsided, and the investigating authorities turned their attention elsewhere.

The newspapers began to lose interest—except one. The Press kept the Sheppard murder case in top position on Page One. It kept steadily prying into the case, asking questions, trying to break through the wall around Dr. Sam.

On July 15, eleven days after Marilyn Reese Sheppard's badly beaten body had been found in the bedroom of their home, I addressed a list of eleven questions to Dr. Sam and his lawyers—one of whom was a prominent criminal lawyer hired by the Sheppard family the very morning Marilyn's body had been found.

Dr. Sam's reply was published on July 17. The answers were noninformative and inconclusive. The situation was just as tight, just as completely roadblocked, just as walled in as before.

On July 20, with the investigation lagging, with the Coroner still fended off by the family and Bay Village friends and officials. The Press published on Page One an editorial. It took the upper quarter of the page, and the eight-column heading said: "Somebody Is Getting Away With Murder."

It was a calculated risk—a hazard of the kind which I believed a newspaper sometimes in the interest of law and order and the community's ultimate safety must take. I was convinced that a conspiracy existed to defeat the ends of justice, and that it would affect adversely the whole law-enforcement machinery of the County if it were permitted to succeed. It could establish a precedent that would destroy even-handed administration of justice.

Because I did not want anyone else on The Press staff to take the risk, I wrote the editorial myself. It may not have been a good editorial, but it was a hard-hitting editorial. It was intended to be. It read in part:

> What's the matter with the law enforcement authorities of Cuyahoga County?
>
> Have they lost their sense of reason?—or, at least inexcusably, set aside the realization of what they are hired to do, and for whom they work?
>
> If ever a murder case was studded with fumbling, halting, stupid, incooperative bungling—politeness to people whose place in this situation completely justified vigorous searching, prompt and effective police work—the Sheppard case has them all.
>
> Was the murder of Mrs. Sheppard a polite matter?
>
> Did the killer make a dutiful bow to the authorities

and, then, proceed brutally to destroy the young child-bearing wife?

Why all of this sham, hypocrisy, politeness, criss-crossing of pomp and protocol in this case?

Who is trying to deceive whom?

From the very beginning—from the first hour that the murder became known to the authorities by a telephone call from the husband to the Town Mayor—from that moment on, and including this, the case has been one of the worst in local crime history.

Of course, the trial is cold. Of course, the clews have been virtually erased by the killer. Of course, the whole thing is botched-up so badly that head or tail cannot be made of it.

In the background of this case are friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly, to the same third-degree to which any other person, under similar circumstances, is subjected, and a whole string of special and bewildering extra-privileged courtesies that should never be extended by authorities investigating a murder—the most serious and sickening crime of all.

The spectacle of a whole community watching a batch of law enforcement officials fumbling around, stumbling over one another, bowing and scraping in the presence of people they ought to be dealing with just as firmly as any other persons in any other crime—that spectacle is not only becoming a stench, but a serious threat to the dignity of law enforcement itself.

Coroner Sam Gerber was never more right than when yesterday he said that the killer must be laughing secretly at the whole spectacle—the spectacle of a community of a million and a half people brought to indignant frustration by Mrs. Sheppard's killer in that white house out in Bay Village.

Why shouldn't he chuckle? Why shouldn't he cover up, shut up, conceal himself behind the circle of protecting people?

What's the matter with us in Cuyahoga County? Who are we afraid of? Why do we have to kow-tow to a set of circumstances and people where a murder has been committed?

It's time that somebody smashed into this situation and tore aside this restraining curtain of sham, politeness, and hypocrisy, and went at the business of solving a murder—and quit this nonsense of artificial politeness that has not been extended to any other murder case in generations.

The evening this editorial was published in The Press on Page One, the Bay Village City Council met and voted to take the investigation away from their own police force and hand it over to the Cleveland Police Department's Homicide Squad.

The next day, also on Page One The Press published an editorial headed: "Why No Inquest? Do It Now Dr. Gerber."

Why hasn't County Coroner Sam Gerber called an inquest into the Sheppard murder case?

What restrains him?

Is the Sheppard case any different from the countless other murder mysteries where the Coroner has turned to this traditional method of investigation?

An inquest empowers use of subpoena.

It put the witnesses under oath.

It makes possible the examination of every possible witness, suspect, relative, record and papers available anywhere.

It puts the investigation itself into the record.

And—what's most important of all—sometimes solves crimes.

What good reason is there now for Dr. Gerber to delay any longer the use of the inquest?

The murder of Marilyn Sheppard is a baffling crime.

Thus far, it appears to have stumped everybody.

It may never be solved.

But this community can never have a clear conscience, until every possible method is applied to its solution.

What, Coroner Gerber, is the answer to the question—

Why don't you call an inquest into this murder?

A few hours after this editorial appeared on Page One of The Cleveland Press, Coroner Gerber ordered an inquest.

At the inquest, Dr. Sam insisted his married life had been a happy one. He denied an "affair" with a former Bay Village Hospital technician now living in California. The Press flew a reporter to Los Angeles with the police. The technician was brought back to Cleveland. She admitted her affair with Dr. Sam, and related talks she had with Dr. Sam about a possible marriage.

The wall still surrounded Dr. Sam. He had gone back to the family-operated hospital.

On July 30, the Cleveland Press published, again spread across the top of its first page, another editorial. This one was headed: "Quit Stalling—Bring Him In." Once more I wrote it myself. It was my neck I was sticking out.

Maybe somebody in this town can remember a parallel for it. The Press can't.

And not even the oldest police veterans can, either.

Everybody's agreed that Sam Sheppard is the most unusual murder suspect ever seen around these parts.

Except for some superficial questioning during Sam Gerber's inquest, he has been scot-free of any official drilling into the circumstances of his wife's murder.

From the morning of July 4, when he reported his wife's killing, to this moment, twenty six days later, Sam Sheppard has not set foot in a police station.

He has been surrounded by an iron curtain of protection that makes Malenkov's Russian concealment amateurish.

His family, his Bay Village friends—which include its officials—his lawyers, his hospital staff, have combined to make law enforcement in this County look silly.

The longer they can stall bringing Sam Sheppard to the police station the more surer it is he'll never get there.

The longer they can string this whole affair out the surer it is that the public's attention sooner, or later, will be diverted to something else, and then the heat will be off, the public interest gone, and the goose will hang high.

This man is a suspect in his wife's murder. Nobody yet has found a solitary trace of the presence of anybody else in the Lake Road house the night or morning his wife was brutally beaten to death in her bedroom.

And yet, no murder suspect in the history of this County has been treated so tenderly, with such infinite solicitude for his emotions, with such fear of upsetting the young man.

Gentlemen of Bay Village, Cuyahoga County, and Cleveland, charged jointly with law enforcement—

This is murder. This is no parlor game. This is no time to permit anybody—no matter who he is—to outwit, stall, fake, or improvise devices to keep away from the police or from the questioning anybody in his right mind knows a murder suspect should be subjected to—at a police station.

The officials throw up their hands in horror at the

thought of bringing Sam Sheppard to a police questioning for grilling. Why? Why is he any different than anybody else in any other murder case?

Why should the police officials be afraid of Bill Corrigan, his lawyer? Or anybody else, for that matter, when they are at their sworn business of solving a murder?

Certainly, Corrigan will act to protect Sam Sheppard's rights. He should.

But the people of Cuyahoga County expect you, the law enforcement officials, to protect the peoples rights.

A murder has been committed. You know who the chief suspect is.

You have the obligation to question him—question him thoroughly and searchingly—from beginning to end, and not at his hospital, not at his home, not in some secluded spot out in the country.

But at Police Headquarters—just as you do every other person suspected in a murder case.

What the people of Cuyhoga County cannot understand, and The Press cannot understand, is why you are showing Sam Sheppard so much more consideration as a murder suspect than any other person who has ever before been suspected in a murder case.

Why?

That night doctor Sam was arrested on a murder charge and taken to Police Headquarters.

The rest of the Sam Sheppard case is familiar. He was indicted by the Grand Jury, tried in a courtroom crowded with newspaper, radio, and television representatives from all over America, convicted of second degree murder, and sentenced to the Ohio Penitentiary, where he is now a prisoner.

The Cleveland Press was both applauded and criticized. It was criticized on the ground that The Press inflamed

public opinion by its persistent and vigorous pounding away at the case. It was criticized by some who expressed the belief that the Sheppard case had been "triad" in the newspapers before it reached the courtroom.

The question confronting The Press, as a newspaper properly concerned about the whole structure of law enforcement in the community, was—

Shall we permit a protective wall to shield a solution to this murder, by saying and doing nothing, or—

Shall we move in with all of our editorial artillery in an effort to bring the wall down, and make it possible for law enforcement authorities to act in their normal and accustomed way?

There were risks both ways. One represented a risk to the community. The other was a risk to The Press. We chose the risk to ourselves.

As Editor of The Press I would do the same thing over again under the same circumstances.